84-1461 (1)

No.

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ALEXANDER L. STEVAS,

In The

Supreme Court of the United States

October Term, 1984

MOYER'S LANDFILL, INC.,

Respondent,

vs.

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP,

Respondent,

PROVIDENCE BUILDERS, INC. AND ALTERNATE ENERGY STORE, INC.,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTION PRESENTED FOR REVIEW

Is there not an unconstitutional taking of private property where a property owner and its successors in interest are denied a court-ordered zoning permit for a proposed sanitary landfill use pursuant to a successful constitutional challenge to the validity of a municipal zoning ordinance where the denial of the zoning permit is based upon the issuance of a permit to a federal court-appointed receiver who had no authority to receive the permit, and upon a retributive regulatory municipal ordinance rezoning the property to prevent its use for a landfill?

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Citations iii

Official and Unofficial Reports of Opinions Delivered in the Courts Below 2

Statement of Jurisdiction 2

Constitutional Provisions 2

Statement of the Case 3

Reasons for Granting the Writ:

I. Introduction 8

II. An unconstitutional taking of private property occurs where a property owner and its successors in interest are denied a court-ordered zoning permit for a proposed sanitary landfill use pursuant to a prior successful constitutional challenge to the validity of the municipal zoning ordinance where the denial of the zoning permit is based upon the issuance of a different permit to a federal court-appointed receiver who had no authority to receive the permit and upon a retributive regulatory municipal ordinance rezoning the property at issue to prevent the use of the property for a landfill. 15

Conclusion 27

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Agins v. City of Tiburon, 447 U.S. 255 (1980) 20

Appeal of Kasorex, 70 Pa. Commonwealth Ct. 193, 452 A. 2d 921 (1982) 28

Barefoot Appeal, 437 Pa. 323, 263 A. 2d 321 (1970) 22

Board of Supervisors v. Moland Development, Inc., Commonwealth Court Nos. 522, 523, 537 C.D. 1974 (Opin. Filed November 23, 1983) 24

Casey v. Zoning Hearing Board, 459 Pa. 219, 328 A. 2d 464 (1974) 16, 19, 20, 28

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 21

Fernald Appeal, 17 Pa. D. & C. 2d (1958) 15

Fretz v. Board of Supervisors, 78 Pa. Commonwealth Ct. 84 (1983) 16

Gallagher v. Building Inspector, 432 Pa. 301, 247 A. 2d 572 (1968) 24

Girsh Appeal, 437 Pa. 237, 263 A. 2d 395 (1970) 16

Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) .. 21

Contents

Page

Guhl v. Holcomb Bridge Road Corp., 238 Ga. 322, 232 S.E. 2d 830 (1977) 22

Hyde v. Pittsburgh Zoning Board of Adjustment, 403 Pa. 415, 169 A. 2d 547 (1961) 25

Jeisy v. City of Taylorville, 81 Ill. App. 3d 442, 36 Ill. Dec. 786, 401 N.E. 2d 627 (1980) 22

Moyer's Landfill, Inc. v. Zoning Hearing Board, 69 Pa. Commonwealth Ct. 47, 450 A. 2d 273 (1982) 2, 3

Moyer's Landfill, Inc. v. Zoning Hearing Board, No. 1741 C.D. 1981 (Commonwealth Court of Pennsylvania 1983) 2

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 21

Pennsylvania Turnpike Commission v. Evans, 13 Pa. D. & C. 2d 290 (1958), aff'd, 392 Pa. 110, 139 A. 2d 530 (1958) 9

Raum v. Board of Supervisors, 29 Pa. Commonwealth Ct. 9, 370 A. 2d 777 (1977) 17, 18

San Diego Gas and Electric Co. v. City of San Diego, 450 U.S. 621 (1981) 20

Tremblay Appeal, 53 Pa. D. & C. 2d 766 (1971)..... 15

Yocum v. Power, 398 Pa. 223, 157 A. 2d 368 (1960) 25

Contents

Page

Zoning Hearing Board v. Weitzel, 77 Pa. Commonwealth Ct. 108, 465 A. 2d 105 (1983) 15

Statutes Cited:

28 U.S.C. Section 2101(c) 2

Pennsylvania Municipalities Planning Code, Act of July 31,, 1968, P.L. 805, as amended, 53 P.S. Section 10101 *et seq.* 15

53 P.S. Section 10107(1) 16

53 P.S. Section 10107(12) 15

53 P.S. Section 10603(2.1) 24

Act of July 9, 1976, P.L. 586, Section 2, 42 Pa. C.S. Section 562 12

United States Constitution Cited:

Fifth Amendment 2, 17, 20, 21, 28

Fourteenth Amendment 2, 17, 21, 28

Rule Cited:

Pa. R. A. P. 2591(b) 12

Other Authorities Cited:

Krasnowiecki, Zoning Litigation and the New Pennsylvania Procedure, 120 U. Pa. L. Rev. 1029 (1972) 28

Contents

Page

Robert Ryan, Pennsylvania Zoning Law and Practice, Section 9.3.3 16

The Equal Protection Clause and Exclusionary Zoning after Valtierra and Dandridge, 81 Yale L.J. 61 (1971) 7

APPENDIX

Judgment of the Supreme Court of Pennsylvania Dated December 14, 1984 ..... 1a

Order of the Supreme Court of Pennsylvania Filed December 14, 1984 ..... 2a

Order of the Supreme Court of Pennsylvania Dated June 5, 1984 ..... 3a

Memorandum Opinion and Order of the Commonwealth Court of Pennsylvania Filed December 19, 1983 ..... 5a

Opinion and Order of the Commonwealth Court of Pennsylvania Filed September 14, 1982 ..... 13a

Order of Lower Providence Township Zoning Board Dated January 19, 1983 ..... 31a

Lower Providence Township Ordinance No. 208 ..... 40a

Permit of Lower Providence Township 47a

Letter from Receiver Dated March 18, 1983 ..... 48a

Contents

Page

Letter of July 15, 1983 Requesting Zoning Permit 50a

Opinion and Order in *Board of Supervisors v. Moland Development Company* 52a

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

(1) *Moyer's Landfill, Inc. v. Zoning Hearing Board,* 69 Pa. Commonwealth Ct. 47, 450 A.2d 273 (1982).

(2) *Moyer's Landfill, Inc. v. Zoning Hearing Board,* No. 1741 C.D. 1981 (Commonwealth Court of Pennsylvania, filed December 19, 1983).

STATEMENT OF JURISDICTION

(1) The order sought to be reviewed is the order of the Commonwealth Court of Pennsylvania dated and filed December 19, 1983;

(2) by order dated February 3, 1984, the Commonwealth Court denied a petition for reconsideration, reargument, and allowance to present additional evidence;

(3) the Supreme Court of Pennsylvania granted a petition for allowance of appeal on June 5, 1984;

(4) by order dated and judgment entered December 14, 1984, the Supreme Court of Pennsylvania dismissed the appeal; and

(5) 28 U.S.C. Section 2101(c) confers jurisdiction on this Court to review the order in question by writ of certiorari.

CONSTITUTIONAL PROVISIONS

This case involves the following constitutional provisions:

(1) U.S. Const. amend. V, which provides, in part, as follows:

> "No person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation . . ."; and

(2) U.S. Const. amend. XIV, which provides, in part, as follows:

"Section 1 . . . Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

STATEMENT OF THE CASE

This case began with the filing by Moyer's Landfill, Inc. of a challenge to the validity of a municipal zoning ordinance based upon an unconstitutional exclusion of sanitary landfill uses. After more than five years of litigation, the Commonwealth Court of Pennsylvania by its order of September 14, 1982, directed Lower Providence Township of Montgomery County, Pennsylvania to issue a zoning permit to Moyer's Landfill, Inc., to permit the operation of a sanitary landfill.

The factual background of this case as established at the hearing before and in the pleadings filed in the state court is summarized in the following chronology:[1]

March 8, 1977 — Moyer's Landfill, Inc., the operator of an existing landfill, files a zoning hearing board application based upon a constitutional challenge to the zoning ordinance of Lower Providence Township for its exclusion of landfills, proposing a landfill on 131 acres of ground in Lower Providence Township, Montgomery County, known as the "Troop Farm" and owned by Providence Builders, Inc. The property is zoned I-Industrial. The Troop Farm is an undeveloped tract of ground next to the existing landfill operated by Moyer's Landfill, Inc.

March 8, 1977 - June 15, 1978 — twenty-five hearings before the zoning hearing board. While the hearings are proceeding, the Township, in August, 1977, amends the zoning ordinance to permit solid waste disposal facilities and sanitary landfills by special exception. The zoning hearing board application is amended to add a request for special exception.

• Numerals in parentheses ("__a") refer to pages in the Appendix, *infra*.

1. The history of the case is also set forth in *Moyer's Landfill, Inc. v. Zoning Hearing Board*, 69 Pa. Commonwealth Ct. 47, 450 A.2d 173 (1982) (13a).

June 15, 1978 — zoning hearing board dismisses appeal of Moyer's Landfill, Inc.

February 27, 1981 — various agreements between Moyer's Landfill, Inc. (equitable owner of the Troop Farm), Providence Builders, Inc. (legal owner of the Troop Farm) and Alternate Energy Store, Inc. (holder of option regarding Troop Farm).

March 17, 1981 — Township files action in court against Providence Builders and Alternate Energy for alleged quarrying on the Troop Farm.

June 23, 1981 — Court of Common Pleas of Montgomery County dismisses Moyer's Landfill, Inc.'s appeal from adverse decision of zoning hearing board.

July 16, 1982 — federal court appoints receiver for Moyer's Landfill, Inc. to close the existing landfill.

September 14, 1982 — Commonwealth Court sustains Moyer's Landfill, Inc.'s appeal and orders Township to issue a *zoning permit* based primarily on the successful constitutional challenge, and, secondarily, upon Moyer's Landfill, Inc.'s request for special exception (30a). The order is as follows:

> "AND NOW, this 14th day of September, 1982, the order of the court of common pleas dated June 23rd, 1981 . . . insofar as it affirms the decision of the zoning hearing board upholding the denial of the zoning permit sought by the petitioner is reversed; and the record is remanded with direction to the zoning authorities of Lower Providence Township to issue the zoning permit." (Emphasis added.)

September 16, 1982 — federal receiver for Moyer's Landfill, Inc., files petition for stay of Commonwealth Court appeal alleging, *inter alia*, that since her purpose is only to close the existing landfill, she has no use for the sought-after landfill use on the adjacent Troop Farm.

September 29, 1982 — despite having authority only to close an existing landfill and allegations in a previously filed petition for stay of the Commonwealth Court proceedings that she has no interest in a permit to operate a landfill on the Troop Farm, the federal receiver requests the Township to issue to her a permit per Commonwealth Court order of September 14, 1982. The receiver does not comply with Township ordinance procedural and substantive requirements governing requests for permits (40a).

October, 1982 — Township files petition in the Supreme Court of Pennsylvania for allowance of appeal from Commonwealth Court order.

December 13, 1982 — after several attempts marred by procedural defects and despite Commonwealth Court order directing issuance of zoning permit, Township rezones Troop Farm property from industrial to highest residential classification which does not permit a sanitary landfill use. An appeal on procedural grounds from the enactment of the rezoning ordinance is still pending in the Court of Common Pleas of Montgomery County.

January 14, 1983 — Supreme Court of Pennsylvania denies Township's petition for allowance of appeal from Commonwealth Court order directing issuance of zoning permit for sanitary landfill.

January 19, 1983 — decision and order of Lower Providence Township Zoning Hearing Board in the application of Alternate Energy Store, Inc., filed in 1981, seeking to establish a surface mine or quarry on the same Troop Farm property based upon the alleged illegal exclusion of surface mines or quarries in the Lower Providence Township Zoning Ordinance. Zoning Hearing Board concludes, *inter alia,* that the Troop Farm property is zoned industrial; that surface mining or quarrying is permitted as a special exception in the I-Industrial district; and that Alternate Energy Store, Inc., is an option holder with regard to the Troop Farm property. Township was a party to the hearings, opposing the application (31a).

January 31, 1983 — Lower Providence Township solicitor creates for the first time in the history of the Township a "special

exception permit" and sends it to the receiver for Moyer's Landfill, Inc. for the sanitary landfill use, without notice either to the principals of Moyer's Landfill, Inc. or to Providence Builders, Inc. the legal owner, or to Alternate Energy Store, Inc., the option holder (as found by the Township zoning hearing board in the case in which the Township was a party), although Township was aware of their respective legal and proprietary interests in the Troop Farm. The "zoning permit" ordered by the Commonwealth Court is not issued. The Township solicitor retains personal custody and control of the Township's copy of the permit and obstructs access to the permit (47a). The special exception permit states it will expire in 6 months.

February 28, 1983 — agreement of sale directly between Providence Builders, Inc. and Alternate Energy Store, Inc., regarding Troop Farm property.

March 18, 1983 — federal receiver returns special exception permit for sanitary landfill use without notice to Providence Builders, Inc., Alternate Energy Store, Inc., or the principals of Moyer's Landfill, Inc. (48a).

May 11, 1983 — agreement entered into between federal receiver and Providence Builders, Inc. providing, *inter alia,* for receiver's disclaimer of any and all interest in any permits or applications for permits for landfilling on the Troop Farm; consenting to assignment to Alternate Energy Store, Inc., of the rights of Moyer's Landfill, Inc., as purchaser under a real estate installment sales agreement between Moyer's Landfill, Inc. and Providence Builders, Inc., dated February 27, 1981; and providing for subordination of lien of Providence Builders, Inc., to permit receiver to generate revenues through gas leases on the contiguous existing landfill.

June 15, 1983 — order of the Honorable Louis H. Pollak, United States District Court for the Eastern District of Pennsylvania, approving agreement between receiver and Providence Builders, Inc. dated May 11, 1983.

July 15, 1983 — within 6 months of the issuance of the special exception permit, Alternate Energy Store, Inc., after allowing

expiration of thirty-day appeal period pertaining to Judge Pollak's order of June 15, 1983, requests *zoning permit* for landfilling on the Troop Farm (50a).

August 31, 1983 — Township Zoning Officer issues letter refusing to issue permit to Alternate Energy Store, Inc., after expiration of the special exception permit, based upon the rezoning of the property.

As the real parties and successors in interest, Providence Builders, Inc., and Alternate Energy Store, Inc., (together referred to as "Landowners"), filed a petition in the Commonwealth Court of Pennsylvania to substitute themselves in the place of Moyer's Landfill, Inc., and to seek enforcement of the order of the Commonwealth Court dated September 14, 1982, directing Lower Providence to issue a *zoning permit* for the sanitary landfill use based primarily upon the successful consitutional challenge and, secondarily, upon the application for special exception. By order dated December 19, 1983, after hearing, the petition was denied.

Landowners submitted a petition for reconsideration of the order dated December 19, 1983, for reargument, and for allowance to present after-discovered additional evidence. This was denied by order of February 3, 1984.

A petition for allowance of appeal was timely filed with the Supreme Court of Pennsylvania, granted by order dated June 5th, 1984, and the appeal was subsequently dismissed by order dated December 14, 1984.

The original order of the Commonwealth Court in September of 1982 sustained a challenge to the constitutionality of the Township zoning ordinance. The constitutional issue of exclusionary zoning was at the heart of the original challenge from its inception. *See The Equal Protection Clause and Exclusionary Zoning after Valtierra and Dandridge,* 81 Yale L.J. 61, 65-66 (1971). The federal constitutional due process issue was raised in the briefs submitted to the Commonwealth and Supreme Courts of Pennsylvania. This issue was not specifically addressed by the Commonwealth Court. The Pennsylvania Supreme Court dismissed the appeal without opinion, and, therefore, did not address the question.

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION

The order of the Commonwealth Court in September of 1982 was what was thought to be the final step in over five years of litigation by the direction to the Township to issue to the successful litigant a zoning permit for the operation of a sanitary landfill. The origins of the case are related to the federally-based and state-developed constitutional doctrine of exclusionary zoning.

The Commonwealth Court's subsequent order dismissing the petition submitted by Landowners for substitution of parties, for enforcement of the order dated September 14, 1982, and the order denying reconsideration deprived Landowners of their constitutional right to use and enjoy their property as previously adjudicated. At all times relating to this case from the commencement of hearings before the Zoning Hearing Board of Lower Providence Township in 1977, the legal owner was and still remains Providence Builders, Inc., one of the Landowners herein.

Evidence was presented before the Commonwealth Court in support of the petition for substitution of parties and for enforcement of order dated September 14, 1982. These facts established, *inter alia*, the legal ownership of Providence Builders, Inc., and the equitable or proprietary interest of Alternate Energy Store, Inc., in the same 131 acre tract since February 27, 1981,[2] prior to the appointment of the federal receiver.

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2. In its memorandum opinion, the court refers to the default of Moyer's Landfill, Inc., under the real estate installment sale agreement with Providence Builders, Inc. However, a default alone does not constitute termination of a contract, and paragraph 23 of this agreement, provided that Moyer's Landfill, Inc., agreed to assign any related information and to cooperate in the event of its default. The various agreements among Moyer's Landfill, Inc., Providence Builders, Inc., and Alternate Energy Store, Inc., received into evidence demonstrated the continuing financial interest of the legal owner, Providence Builders, Inc., beyond its legal title, in the future of the Troop Farm property. The court, therefore, was in error in concluding that Providence Builders, Inc., "yielded whatever rights it may have had as a landowner to Moyer's and/or AES." (11a, n.3).

In connection with a lawsuit filed by citizens against Moyer's Landfill, Inc., arising out of the existing landfill use on the adjacent tract (not the Troop Farm involved in the case at bar), a receiver was appointed by a federal district court for the purpose of closing that landfill. By this consent decree, no authority was conferred upon the federal receiver with regard to the landfill permit involved in the litigation then pending. The purpose of the consent decree was to close the existing landfill. Although the memorandum opinion of the Commonwealth Court refers to "debtor" with regard to the federal receiver, this was not a bankruptcy matter. In the non-bankruptcy setting,

> "The receiver stands in the shoes of the corporation or person whose property is in receivership with exactly the same rights and obligations, with respect to such property, that such person had at the inception of the receivership . . . ."

Pennsylvania Turnpike Commission v. Evans, 13 Pa. D. & C. 2d 290, 298-299 (1958), *aff'd,* 392 Pa. 110, 139 A. 2d 530 (1958). Thus, it was the obligation of the receiver for Moyer's Landfill, Inc., to acknowledge, respect, exercise, and be bound by the various agreements to which Moyer's Landfill, Inc., was a party prior to the inception of the receivership insofar as these did not conflict with the duties conferred upon the receiver. No such conflict existed, since the agreements received into evidence concerned the Troop Farm owned at all times by Providence Builders, Inc., and not the existing landfill which was the subject of the federal court proceedings. Nevertheless, the receiver's actions, by the effect of the Commonwealth Court's disposition, abrogated legal agreements previously entered into which represented a valuable asset for Moyer's Landfill, Inc., as well as for the title owner, Providence Builders, Inc., and the option holder, Alternate Energy Store, Inc.

Prior to receipt of the court's order of September 14, 1982, sustaining the appeal of Moyer's Landfill, Inc., the receiver had attempted to stay the court's disposition based on a petition filed of record in which she stated, in paragraph 7, that

> "[Moyer's Landfill, Inc.] would not be in any position to apply for a building permit and begin

> any activity on the premises within the requisite time period under the Lower Providence Township Zoning Ordinance since [Moyer's Landfill, Inc.] is effectively insolvent and under order to complete to closure of its existing landfill premises."

Consistent with the receiver's verified statement contained in the petition,was the receiver's affidavit, filed in the federal court proceedings in April 1983. In paragraph 8 thereof, the receiver stated, under oath, that

> " . . .her duties do not include any obligation to implement the scheme to make a landfill out of the Troop Farm."

The receiver thereby acknowledged that this was not merely a discretionary judgment, but pursuant to her official charge from the court. Landowners' petition for reconsideration filed in the Commonwealth Court stated that Landowners would have offered into evidence this affidavit filed of record in the federal court demonstrating a course of conduct by the receiver suggesting more than the "hints of complicity" referred to in the court's memorandum opinion.

Despite the statement of the receiver contained in her verified petition to stay the Commonwealth Court appeal, by letter dated September 29, 1982, the receiver requested the issuance of the permit from the Township. The request did not comply with Township requirements governing such permit requests. A copy of this letter was sent to all parties involved including the principals of Moyer's Landfill, Inc., and counsel for Moyer's Landfill, Inc., of record in the lower court. No permit then issued.

On December 13, 1982, after several attempts marred by procedural defects, the Township enacted an ordinance to rezone the 131 acre Troop Farm property to R-1, the highest residential classification on ground previously zoned the heaviest industrial classification and adjacent to Moyer's Landfill Inc.'s existing landfill. The R-1 zone *does not permit* a sanitary landfill use.

On January 31, 1983, Lower Providence Township issued a "special exception permit" to the receiver. No permit for a

special exception previously existed. In fact there is no provision in the Township ordinance for this type of permit (40a). The permit was created by the Township solicitor for this occasion, and he retained all records pertaining thereto. Although Lower Providence Township and Alternate Energy Store, Inc., had been embroiled as opposing parties in a number of legal proceedings involving this same 131 acre Troop Farm property, and although the receiver had no authority regarding the permit and conceded this fact, neither the Township nor the federal receiver provided notice of the issuance of the "special exception permit" to Providence Builders, Inc., to Alternate Energy Store, Inc., or to the principals of Moyer's Landfill, Inc. Less than fifty days later, the receiver returned the special exception permit to the Township with a letter *to the Township solicitor* stating that she did "not intend to make use of this permit." Again, neither the Township nor the receiver provided notice of the return of the permit to the principals of Moyer's Landfill, Inc., to Providence Builders, Inc., or to Alternate Energy Store, Inc.

A summary of the federal receiver's actions concerning the proposed Troop Farm landfill and the sought-after court-ordered permit is as follows:

September 16, 1982 — receiver seeks stay of zoning litigation pending in the Commonwealth Court stating that the insolvency of the landfill company precludes its ability to apply for a building permit and begin any activity with regard to a landfill on adjacent property.

September 29, 1982 — following the Commonwealth Court decision, the receiver changes her mind and requests issuance of the special exception permit.

February 2, 1983 — in private correspondence between the Township solicitor and the receiver, the receiver receives special exception permit No. 1-83, dated January 31, 1983, with no notice to other persons or parties.

March 18, 1983 — the receiver changes her mind again and returns the special exception permit which she did not want in the first place. The permit is returned in correspondence between the Township solicitor and her with copies to no other person or party.

April 29, 1983 — receiver files affidavit in the federal court acknowledging that her duties do not include the implementation of "the scheme to make a landfill out of the Troop Farm." She further disclaims any interest in landfilling on the Troop Farm.

May, 1983 — although she has already returned the permit, receiver enters into an agreement with Providence Builders, Inc., *inter alia,* disclaiming any and all interest in any permits or applications for permits for landfilling on the Troop Farm.

The order of the court, which nullified the five plus years of litigation concerning the constitutional validity of the Township's zoning ordinance excluding sanitary landfills resulting in the court order directing the issuance of a zoning permit for a sanitary landfill, was based on the Township's sending to the federal receiver a custom-made "special exception permit", the secretive return of that permit by the receiver less than fifty days after its receipt, and the retributive rezoning of the Troop Farm property.

Landowners sought relief from the Commonwealth Court pursuant to statutory authority conferring power upon the Commonwealth Court to go beyond mere invalidation of an ordinance by granting definitive relief. Act of July 9th, 1976, P.L. 586, Section 2, 42 Pa. C.S. Section 562; Pa. R.A.P. No. 2591(b). Landowners' application for relief requested the lower court to enforce its order of September 14, 1982, against Township.

An analysis of the memorandum opinion of the Commonwealth Court in support of its order dated December 19, 1983, denying this relief is as follows:

1. at all times relating to this litigation, Providence Builders, Inc., owned the 131 acre Troop Farm;

2. the Commonwealth Court has the power to issue an order to enforce its earlier judgment;

3. where the court sustains a constitutional challenge and orders that a litigant be permitted to proceed under a zoning ordinance, a subsequent rezoning cannot defeat this right;

4. a zoning permit pertains to the land, not to ownership;

5. the order of the court dated September 14, 1982, directed the issuance of a "zoning permit" and the consideration of the special exception issue was "secondary". The court in its order of September 14, 1982, directed that Moyer's Landfill, Inc., "was entitled to a special exception permit *as well*" (emphasis added);

6. a federal receiver stands in the shoes of the "debtor". On September 29, 1982, the federal receiver was the real party in interest with regard to the landfill use on the 131 acre Troop Farm;

7. although the receiver disclaimed any interest in the landfill permit in a verified petition filed in court, her subsequent request for and receipt of the special exception permit and the return thereof after less than fifty days, was merely an instance where she "changed her mind";

8. the Township's issuance of the "special exception permit" was "literal compliance" with the court's order of September 14, 1982.

In effectively nullifying this protracted litigation, the Commonwealth Court approved and upheld the following:

A. The abrogation of the constitutional rights of the successful litigant's successors in interest to use and enjoy the property consistent with the court order sustaining the constitutional challenge to the validity of the zoning ordinance and directing issuance of the zoning permit.

B. The retributive rezoning and confiscatory taking by the Township of the successful litigant's property, ensuring that the successful litigant's successors in interest would be unable to use and enjoy the property consistent with the court order sustaining the challenge to the validity of the zoning ordinance.

C. The issuance of a "special exception permit" by the Township to a federal receiver despite the fact that: (1) the court

order required the issuance of a "zoning permit"; (2) the federal receiver had authority only to close an existing landfill of the successful litigant on other property and had no authority regarding the permit for the proposed landfill ordered by the court; (3) the receiver's request for the permit did not comply with the Township ordinance regarding permit requests; (4) the Township had no provision for and had never before in its history issued such a document as a "special exception permit"; and (5) the permit was issued contrary to the Township's own procedures regarding the issuance of permits.

D. The "special exception permit" was issued without notice to the successful litigant or the successors in interest, despite knowledge by the Township of the interest of the litigant and the successors in interest.

E. The Township failed to maintain normal and adequate records regarding the permit, refused the successful litigant and successors in interest access to any records that did exist and engaged in conduct to prevent the successful litigant and the successors in interest from obtaining any information regarding the permit.

The order of the court dated December 19, 1983, as confirmed by the order of February 3, 1984, has sanctioned the unconstitutional taking of Landowners' property.

II.

AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY OCCURS WHERE A PROPERTY OWNER AND ITS SUCCESSORS IN INTEREST ARE DENIED A COURT-ORDERED ZONING PERMIT FOR A PROPOSED SANITARY LANDFILL USE PURSUANT TO A PRIOR SUCCESSFUL CONSTITUTIONAL CHALLENGE TO THE VALIDITY OF THE MUNICIPAL ZONING ORDINANCE WHERE THE DENIAL OF THE ZONING PERMIT IS BASED UPON THE ISSUANCE OF A DIFFERENT PERMIT TO A FEDERAL COURT-APPOINTED RECEIVER WHO HAD NO AUTHORITY TO RECEIVE THE PERMIT AND UPON A RETRIBUTIVE REGULATORY MUNICIPAL ORDINANCE REZONING THE PROPERTY AT ISSUE TO PREVENT THE USE OF THE PROPERTY FOR A LANDFILL.

In the memorandum opinion, Judge MacPhail acknowledges that zoning runs with the land. However, the holding that the permit has been abandoned by the receiver's possession of the permit for less than fifty days violates this principle and coupled with the rezoning of the property has effected an unconsitutional taking of the property. That zoning pertains to the land has always been the case concerning the granting of special exceptions and variances. *Zoning Hearing Board v. Weitzel,* 77 Pa. Commonwealth Ct. 108, 113, 465 A. 2d 105, 108 (1983); *Tremblay Appeal,* 53 Pa. D. & C. 2d 766 (1971); *Fernald Appeal,* 17 Pa. D.& C. 2d 291 (1958). The Pennsylvania Municipalities Planning Code ("MPC"), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. Section 10101 *et seq.,* defines "landowner" as:

> "The legal or beneficial owner or owners of land including the *holder of an option* or a contract to purchase (whether or not such option or contract is subject to any conditions) . . . or other persons having a proprietary interest in land, shall be deemed to be a landowner for the purpose of this act."

Section 107(12) of the MPC, 53 P.S. Section 10107(12) (emphasis added). By this definition, one is a "landowner" if he is the legal

owner, equitable owner, or holder of an option. *Accord,* Robert Ryan, *Pennsylvania Zoning Law and Practice,* Section 9.3.3. Thus, the Commonwealth Court erred regarding the legal significance in the case at bar of Alternate Energy Store, Inc.'s exercise or failure to exercise the option (9a). Factually, contrary to the court's opinion, the evidence was that the option *had* been exercised. "Applicant" is further defined as one who files an application under the state MPC, "including his heirs, successors and assigns." Section 107(1), 53 P.S. Section 10107(1). Although the proceedings at issue have long passed the original zoning hearing board application, there is no question of the applicability of the MPC definitions and provisions to the case at bar. Under all of the facts before the court, each of the petitioners was a "landowner" with regard to the Troop Farm property. Under the principles of real party in interest, and pursuant to fundamental principles of Pennsylvania land use law, Landowners had the requisite standing to request issuance of the permit pursuant to the Commonwealth Court's original order of September 1982.

The definitions contained in the MPC provide a statutory basis for Landowners to be substituted as the real parties in interest as the successors to Moyer's Landfill, Inc. The rights of successors have been affirmed in prior Pennsylvania appellate decisions. *Casey v. Zoning Hearing Board,* 459 Pa. 219, 328 A. 2d 464 (1974). In *Casey, supra,* the appellant was the successor in interest to the applicant who had appeared before the zoning hearing board. The court referred to a subsequent enforcement order following the decision in *Girsh Appeal,* 437 Pa. 237, 263 A.2d 395 (1970), whereby the assignees of Mr. Girsh's rights were held entitled to the issuance of a building permit. In *Girsh,* the court declared unconstitutional a municipal zoning ordinance which failed to provide for multi-family housing. The principle is, therefore, that a court order directing the issuance of a zoning permit pertains to the land, runs with the land, and is not personal to the particular litigant so as to preclude entitlement to the successful litigant's successors in interest. *See* Robert Ryan, *Pennsylvania Zoning Law and Practice,* Sections 9.4.30, 9.5.5. The rights of successors were again noted in *Fretz v. Board of Supervisors,* 78 Pa. Commonwealth Ct. 84, 466 A.2d 1125 (1983).

The Commonwealth Court's order of December 19, 1983, improperly personalized the right to a zoning permit in holding

that less than fifty days of possession by a federal receiver with questionable authority to request a permit at all constituted an abandonment of the judicially declared right to that permit upon its return to the municipality, notwithstanding the interests of legal and beneficial owners.

The judicial determination of abandonment of the permit when taken together with the Township's rezoning of the property places the case within the protective umbrella of the V and XIV amendments to the Constitution of the United States.

In the Commonwealth Court's memorandum opinion, the court noted the protection given a successful litigant against retributive rezoning by a municipality. However, today, and as of the date of the evidentiary hearing before the court, the only basis for the termination of any party's right to develop the Troop Farm as a landfill as ordered by the Commonwealth Court on September 14, 1982, is the December, 1982 rezoning by Lower Providence Township. But for this regulatory ordinance, the Township would have no basis upon which to stop any rightful party in interest from applying for the zoning permit ordered by the Commonwealth Court in September of 1982.

The Township's actions in rezoning the Troop Farm property and refusing to issue the zoning permit to petitioners amount to nothing more than an attempt to thwart Landowners' constitutionally vested right to use and enjoy their property after five years of zoning litigation with the Township. Despite the Pennsylvania Supreme Court's recent dismissal of Landowners' appeal, the issue of a property owner's right to proceed after a successful court adjudication has been resolved by prior decisions. In *Raum v. Board of Supervisors,* 29 Pa. Commonwealth Ct. 9, 370 A. 2d 777 (1977), the court granted a petition to enforce a prior judgment, thereby defeating a municipality's attempt to thwart a prior adjudication by delays, rezoning, unreasonable fee schedules, and other dilatory tactics. The prior adjudication affirmed the legality of zoning as enacted by the municipality's governing body. The court stated that *judicial* decisions concerning the legality of zoning are not "academic exercises but rather confer upon the landowner the right to develop his land." 29 Pa. Commonwealth Ct. at 16, 370 A. 2d at 782.

> "The successful litigant's right to proceed by way of Pa. R.A.P. 2591(b) means that unjustifiable actions by a municipality to prevent him from proceeding are in direct conflict with the adjudication establishing the validity of the zoning." 29 Pa. Commonwealth Ct. at 17, 370 A. 2d at 783.

The court referred to its inherent power to issue appropriate relief in aid of the prior judgment where one of the parties refuses "to abide by the appellate decision." 29 Pa. Commonwealth Ct. at 46, 370 A. 2d at 797. The court held that the property owner's rights became vested by the adjudication and *could not be denied* by a change in zoning. The municipality's efforts to thwart the adjudicated rights of the property owner by rezoning were given strong condemnation:

> "Attempts to legislatively amend approved zoning for the purpose of frustrating development can be viewed as nothing more than contempt . . . ."

29 Pa. Commonwealth Ct. at 50, 370 A. 2d at 799.

In *Raum,* the Township governing body announced its intention to hold hearings on amendatory zoning ordinances (which prohibited the successful litigant's proposed use) when the lower court first held the zoning unlawful, and within a few days after the Supreme Court denied allocatur petitions. Lower Providence Township enacted its ordinance rezoning the Troop Farm, on December 13, 1982, three months after the order of the Commonwealth Court sustaining the constitutional challenge. Also in *Raum,* the court held the revocation of previously issued building permits to have been "a prime exhibition of bad faith explicitly contradicting our prior Order." 29 Pa. Commonwealth Ct. at 61, 370 A. 2d at 804. In the case at bar, the Township wishes to legislatively pull the rug out from under Landowners by holding a newly enacted zoning ordinance to apply to this tract. The constitutional guarantee of due process of the law simply does not permit what would amount to a confiscatory taking of Landowners' property.

The issue of appropriate relief for a property owner successful in attacking the constitutionality of the zoning ordinance was addressed by the Pennsylvania Supreme Court in *Casey v. Zoning Hearing Board, supra.* In discussing a portion of the MPC, since repealed, the court held that it had never been the intention of the legislature to allow a municipality to remedy its ordinance in such a way as would defeat a previously successful challenger to the validity of that ordinance.

> "To so read the legislative intent would effectively grant the municipality the power to prevent any challenger from obtaining meaningful relief after a successful attack on a zoning ordinance. The municipality could penalize the successful challenger by enacting an amendatory ordinance designed to cure the constitutional infirmity, but also designed to zone around the challenger. Faced with such an obstacle to relief, few would undertake the time and expense necessary to have a zoning ordinance declared unconstitutional."

459 Pa. at 228, 329 A. 2d at 468. The court refused to permit a municipality to "zone around a successful challenger to its zoning ordinance." 459 Pa. at 228, 329 A. 2d at 468.

> "Following our decision in *Girsh Appeal,* the Township of Nether Providence enacted an amendatory ordinance providing for apartment uses in the Township, but left the [Girsh] Duer Tract zoned R-1 Residential. Nevertheless, the assignees of Mr. Girsh's rights, the Altmans, sought issuance of the building permit originally applied for. This court, in response to a petition for enforcement of our order in *Girsh Appeal* directed the Township's Building Inspector to issue such building permit upon compliance by the petitioners with the Township Building Code. In so doing, we recognize that an applicant, successful in having a zoning ordinance declared unconstitutional, should not be frustrated in his quest for relief by a retributory Township."

459 Pa. at 228, 329 A. 2d at 468 (brackets in original; footnote omitted).

The retributive intentions of Lower Providence Township could not be more clear: according to the present zoning ordinance, enacted December 13, 1982, petitioners' tract was rezoned from the heaviest industrial classification to R-1 Residential, the *highest* classification of residential zoning in the Township permitting single-family homes despite its location next to an existing landfill in such environmental condition as to warrant a federal consent decree directing its closure, a strange place indeed for single-family homes on 65,000 square foot lots. Thus, the Township in the case *sub judice* has done precisely what the courts have not permitted — changed the zoning of property of a successful challenger to the validity of the zoning ordinance in order to frustrate the property owner's quest for relief. But for the change in zoning to R-1, there would be no reason to preclude the issuance of the zoning permit ordered by the Commonwealth Court in September of 1982, and the court's decision impliedly condones the retributive rezoning as the nullification of the prior litigation. But for the rezoning, nothing would prevent a renewed request for issuance of the permit, an event common in zoning with regard to requests for building permits returned until financing is secured, until weather is suitable, *inter alia.*

In *San Diego Gas and Electric Co. v. City of San Diego,* 450 U.S. 621 (1981), which began as an action in inverse condemnation, the issue was whether or not a state must provide a monetary remedy to a landowner whose property has allegedly been taken by a regulatory ordinance where that ordinance is claimed to be in violation of the just compensation clause of the Fifth Amendment. This Honorable Court held that it lacked jurisdiction, there being no final judgment. Four members of this Court dissented on the grounds that the highest court of the State of California had held that there had, in fact, been no taking. The dissent quoted the prior decision of this Court in *Agins v. City of Tiburon,* 447 U.S. 255 (1980), also an action for inverse condemnation. Addressing the taking issue, this Court said,

> " . . .[t]he application of a general zoning law to a particular property effects a taking if the

> ordinance does not substantially advance legitimate state interests . . . or [if it] denies an owner economically viable use of his land . . . ."

Accord, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922),

> " . . .if regulation goes too far it will be recognized as a taking . . . ."

The matter now before this Court is the return of the issue of the police power versus an unconstitutional confiscation of private property. In *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926), this Court upheld a zoning ordinance as a valid exercise of municipal authority. Similarly, in *Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962), the Court affirmed the validity of an ordinance regulating dredging and pit excavating.

In the case at bar, however, although not founded in inverse condemnation, the arbitrary and excessive exercise of municipal power in the highly suspect circumstances concerning the issuance of a special exception permit and the rezoning of the Troop Farm property raises the red flag of that which is prohibited by the Fifth and Fourteenth amendments. Beginning in 1977, the original litigant and its successors in interest, Landowners herein, have wound their way through the state court system seeking redress, only to have relief granted and summarily and unconstitutionally nullified. The devastating impact upon Landowners' ability to use their property as originally ordered by the Pennsylvania Commonwealth Court must not be condoned.

Landowners also submit that this Court's review is warranted by an apparent conflict between the relief afforded the Pennsylvania state courts to a litigant successful in attacking the validity of a municipal ordinance and that ordered by the highest courts of other states. Pennsylvania courts, as evidenced in the cases cited in this petition, have adopted the position that they may not order a rezoning of the property of the successful litigant, since this is a legislative matter. Their unwillingness to do so subjects the property owner to the perils of what Landowners have encountered in the case *sub judice.* In marked contrast, the

highest courts of at least two other states fashion a more affirmative and constitutionally consistent remedy in ordering and affirming the judicial rezoning of the property of the successful litigant. *Accord, Jeisy v. City of Taylorville,* 81 Ill. App. 3d 442, 36 Ill. Dec. 786, 401 N.E. 2d 627 (1980); *Guhl v. Holcomb Bridge Road Corp.,* 238 Ga. 322, 232 S.E. 2d 830 (1977).

Particularly where the original validity attack is a constitutional one, such as that which is at issue in exclusionary zoning cases, the remedy to be fashioned must afford the successful litigant meaningful relief, or risk subjecting that litigant to the retributive efforts of a vengeful municipality with little regard for the constitutional guarantees of due process and equal protection under the law.

The court's memorandum opinion in support of the order of December 19, 1983, is also in error in light of the facts and the law with regard to the Township's "literal compliance" with the court's prior order of September 14, 1982. The court acknowledged in the memorandum opinion that the special exception issue was "secondary" only, having arisen when the Township attempted to cover its tracks during the original zoning litigation by amending its ordinance to provide for previously excluded sanitary landfills as a use by special exception. How can the issuance of a "special exception permit", conceded to be *secondary* to the main constitutional challenge, be "literal compliance" with an order directing the issuance of a zoning permit based principally upon that successful constitutional challenge?

The Township issued a "special exception permit", and not a zoning permit only because the Township ordinance limits the life of special exception approvals by the zoning hearing board to six months. The ordinance does not refer to special exception *permits* and has no such limitation applicable to a zoning permit, especially one that has been judicially declared. In *Barefoot Appeal,* 437 Pa. 323, 263 A. 2d 321 (1970), the court held that absent a time limitation in an ordinance, a special exception permit runs with the land and a permit shall issue to successors even if applied for six years after the granting of the special exception.

The Township's retributive rezoning of the Troop Farm to its highest residential classification is only one aspect of the highly suspect sequence of events. After the evidentiary hearing in the Commonwealth Court, Landowners discovered a number of facts that were within the exclusive control of the Township and previously undiscoverable. These facts included: the creation and issuance of a "special exception permit" without precedent; the creation of that permit by the Township solicitor who kept control of the permit and related papers; the absence of a copy of that permit in the records of the Township where similar records were kept in the ordinary course of the Township's business; preventing access of a principal of Moyer's Landfill, Inc., to the permit; non-compliance by the receiver with Township requirements for applications requesting issuance of permits (for example, such applications are to include a statement of the proposed use, working plans, *inter alia*); the requirement under the Township ordinance that permits for construction or uses alleged to be authorized special exceptions shall be issued by the zoning officer only upon order of the zoning hearing board, and other facts establishing Township's knowledge of the right and interest to the Troop Farm property of both Providence Builders, Inc., and Alternate Energy Store, Inc., which have critical importance given the failure of the Township to notify these parties of the issuance and return of the special exception permit. The Commonwealth Court improperly refused to allow supplementation of the record.

An examination of that "special exception permit" itself suggests its *ad hoc* nature, designed to do what the Commonwealth Court has now sanctioned — the issuance of a permit to one who had no intention of using it for the purpose of nullifying the litigation won in September of 1982. Under the zoning ordinances of Lower Providence Township, there is no such permit as a "special exception permit." (40a). This was purely and simply an attempt by the Township to evade the mandate of the court's order of September 14, 1982, an attempt so far successful.

With regard to this magical six months' life of a special exception issued in Lower Providence Township, certainly it is well known that land uses requiring permits from the state Department of Environmental Resources, such as landfills, cannot

be secured in a short period of time,[3] and the six months' limitation imposed by Lower Providence Township with regard to the securing of a building permit when a special exception is granted by the *zoning hearing board* (as distinguished from a judicial declaration) renders the granting of a special exception for a landfill use essentially meaningless. More importantly, at the sake of repetition, the special exception issue was a "*secondary*" issue in the litigation that was won in September of 1982. Nonetheless, the court held the issuance of this so-called "special exception permit" to be literal compliance with its order of September 14, 1982, directing the issuance of a zoning permit based principally on the successful constitutional challenge.[4]

The Township presented no authority to the court for the limited life of *any permit*. Without evidence from the Township the court accepted the special exception limitation, and yet noted the absence of evidence regarding limitations for zoning permits (11a n.6). The Lower Providence Township zoning ordinance does limit the life of a special exception granted by the zoning hearing board and absent some compelling or equitable reason, such provisions have been enforced. However, the case before the Court does not involve a special exception only, and the ordinance contains no such limiting life for a zoning permit.

In less compelling circumstances, the Pennsylvania Supreme Court has upheld the vested right of a property owner who secured building permits in good faith. In *Gallagher v. Building Inspector,* 432 Pa. 301, 247 A. 2d 572 (1968), the court upheld the validity of building permits that the municipality attempted to revoke even though the property owner had not expended monies in reliance upon the permits. In that case, the owner obtained the building permits in good faith before the retributive municipality began

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3. *Cf. Board of Supervisors v. Moland Development, Inc.*, Commonwealth Court Nos. 522, 523, 537 C.D. 1974 (Opin. filed November 23, 1983) (52a). The protection against retributive rezoning afforded by the Commonwealth Court in *Moland* could not be more inconsistent and at variance with its holding in the case at bar.

4. Special exceptions granted for land developments or subdivisions now have additional protection against rezoning by MPC Section 603(2.1), 53 P.S. Section 10603(2.1).

any action for rezoning. The court recognized the substantial and serious harm the property owner would sustain should it be unable to sell its property as a result of the rezoning. *Quoting Yocum v. Power,* 398 Pa. 223, 227, 157 A. 2d 368, 370 (1960), the opinion stated,

> " 'As nothing can be more unjust in criminal law than an *ex post facto* law, so nothing is more frowned on in civil law than a proceeding which has the effect of making illegal what the law has already recognized as legal.' " 432 Pa. at 306-307, 247 A. 2d at 574.

In the case before this Honorable Court, Lower Providence by its retributive rezoning and the quick dispatch and return of the special exception permit is attempting to make illegal what Landowners' predecessor in interest won the right to do in September of 1982. In *Hyde v. Pittsburgh Zoning Board of Adjustment,* 403 Pa. 415, 169 A. 2d 547 (1961), the court upheld the reinstatement of a building permit where, based upon the ordinance language continuing the validity of a permit when substantial construction or establishment was shown, the property owner was compelled to limit its operations because of neighbors' dilatory tactics. The principle espoused in that decision is apposite in the case *sub judice,* given the Township's longstanding and varied tactics to prevent this landfill use.

In addition to fundamental constitutional and zoning principles, the manifest lack of good faith and fairness that will result should the state court's order be dispositive requires the granting of the petition. The testimony presented demonstrated a course of negotiations between Landowners and the federal receiver, the purpose of which was to ensure the Landowners all rights to the zoning permit. Despite these negotiations, without notice to Providence Builders, Inc., and Alternate Energy Store, Inc., parties to these negotiations, the receiver received and returned the permit which was at the very heart of the negotiations. The Township issued its permit *without notice* to Providence Builders, Inc., the legal owner, and without notice to Alternate Energy Store, Inc., the option holder, even though the Township was well aware of the interests of both of these entities.

The machinations involved in the issuance by Lower Providence Township of this specially designed "special exception permit" and the at least suspect conduct of the federal receiver amount to more than unfounded allegations and more than the conferring of legal status to the proverb that it was the receiver's prerogative to change her mind (9a). The reasons for the power conferred upon the courts to enforce their earlier orders, for the constitutional protection afforded successful litigants against retributive rezoning, and for the judicial system itself are to protect the rights of a party who has spent so much time and money for the vindication of those very rights and that party's successors. The Commonwealth Court's order of December 19, 1983, as confirmed by its order of February 3, 1984, eviscerates the vital precepts embodied by the law of zoning and the constitutional guarantee of the right to property. The effect of the court's orders places a confiscatory hand on this property with the indescribable "declaration" by Judge MacPhail that "Moyer's won the battle but lost the war" (10a).

CONCLUSION

The irreparable damage that Landowner will sustain, the significant potential for precedent presented by the court's refusal to enforce its September 1982 order, and the fundamental constitutional question involved compel the granting of the petition for writ of certiorari. After twenty-five hearings before the zoning hearing board and five years of litigation between 1977 and 1982, *this property*, the 131 acre Troop Farm, won the right to a *zoning permit* for a sanitary landfill use, a right that under law passed to the legal owners and to its successors and assigns. A federal court receiver was appointed to close an existing landfill on an adjacent property; in exercising those rights, she disclaimed and ultimately assigned to Landowners any and all interest she had in the landfill permit ordered by the lower court; but, without notice to those with whom she was negotiating secured and returned a "special exception permit", which she did not want and had no authority to use. Months later she received valuable consideration and assigned her rights to the permit although, according to the court, she then had none.

By order of September 14, 1982, the court directed the issuance of a *zoning permit*. The peculiar circumstances involving Lower Providence Township's issuance of a custom-made "special exception permit" to the receiver and her rapid return of that permit without notice to other parties in interest, do not constitute literal compliance of the lower court's order of September 14, 1983, directing the issuance of a zoning permit based upon a successful constitutional challenge, particularly where the receiver lacked legal authority to request, receive, and return the permit.

Providence Builders, Inc., as the legal owner, and Alternate Energy Store, Inc., as the disclosed option holder, have the necessary right, title, and interest to the issuance of the permit, a permit that runs with the ground.

Through a variety of machinations, Lower Providence Township has attempted to undercut the rights of those properly in interest with regard to the landfill approved for the Troop Farm property. It has been held consistently that such actions are not to be tolerated.

> "The incentive necessary to raise worthy constitutional challenges cannot be thwarted."

Appeal of Kasorex, 70 Pa. Commonwealth Ct. 193, 198, 452 A. 2d 921, 923 (1982), *citing Casey, supra*, 459 Pa. at 228-9, 328 A. 2d at 468.

The Commonwealth Court erred in not enforcing its prior order and granting meaningful, definitive relief. As the Pennsylvania Supreme Court has stated,

> " 'Obviously, if judicial review of local zoning action is to result in anything more than a farce, the courts must be prepared to go beyond mere invalidation and grant definitive relief.' To forsake a challenger's reasonable development plans after all the time, effort and capital invested in such a challenge is grossly inequitable."[5]

The order of the Commonwealth Court failed to grant the definitive relief to which Landowners were entitled and condoned the confiscatory impact of the municipality's rezoning of the Troop Farm property. The constitutional protections afforded by the Fifth and Fourteenth amendments to the United States Constitution do not allow this result.

For these reasons, a writ of certiorari should issue.

Respectfully submitted,

MARC D. JONAS
Attorney for Petitioners

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5. *Casey, supra*, 459 Pa. at 230, 328 A. 2d at 469, *quoting* Krasnowiecki, *Zoning Litigation and the New Pennsylvania Procedure*, 120 U. Pa. L. Rev. 1029, 1082 (1972).

JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA DATED DECEMBER 14, 1984

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 86 E.D. Appeal Docket 1984

MOYER'S LANDFILL, INC.

v.

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPEAL OF: PROVIDENCE BUILDERS, INC., and ALTERNATE ENERGY STORE, INC.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the appeal having been improvidently granted, the same is hereby dismissed.

BY THE COURT:

s/ Marlene F. Lachman
Marlene F. Lachman, Esq.
Prothonotary

Dated: December 14, 1984

ORDER OF THE SUPREME COURT OF PENNSYLVANIA FILED DECEMBER 14, 1984

IN THE SUPREME COURT OF PENNSYLVANIA

No. 86 E.D. Appeal Dkt. 1984

MOYER'S LANDFILL, INC.

v.

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

Appeal of Providence Builders, Inc., and Alternate Energy Store, Inc.

Appeal from Order of Commonwealth Court entered February 3, 1964, at No. 1741 C.D. 1981, Denying Petition for Reconsideration of Order of Commonwealth Court entered December 19, 1983

ORDER

PER CURIAM Filed: December 14, 984

Appeal dismissed as having been improvidently granted.

ORDER OF THE SUPREME COURT OF PENNSYLVANIA DATED JUNE 5, 1984

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

June 7, 1984

Marc. D. Jonas, Esq.
One Montgomery Plaza # 400
Norristown, Pa. 19401

Re: Moyer's Landfill, Inc. v. Zoning Hring. Brd. of Lower Prov. Twnship
APPEAL OF: PROVIDENCE BUILDER INC. & ALTERNATE ENERGY STORES, INC.
No. 86 E.D. APPEAL DOCKET, 1984
(Formerly No. 126 E.D. Allocatur Docket, 1984)

Dear Mr. Jonas:

This is to advise you that the following Order has been endorsed on your Petition For Allowance of Appeal, filed in the above-captioned matter:

June 5, 1984

PETITION GRANTED. PER CURIAM.

Accordingly, your appeal has been docketed as of June 7, 1984 at No. 86 E.D. APPEAL DOCKET, 1984. You are further advised that appellant's brief and record are due for filing on July 17, 1984 and appellee's brief must be filed within thirty days after service of the brief for appellant.

Order

THE COURT WILL NOT ENTERTAIN PETITIONS FOR EXTENSION OF TIME EXCEPT FOR THE MOST COMPELLING REASONS. Such petitions will not be accepted for filing unless received by the Prothonotary at least two weeks prior to the date on which briefs are due.

Your attention is directed to Pa.R.A.P. 2111(b) which provides that copies of the lower court opinions must be appended to the appellant's briefs. This rule will be strictly enforced and no briefs will be accepted for filing which do not comply with this requirement.

Very truly yours,

s/ Patrick Tassos
Patrick Tassos
Deputy Prothonotary

PT:jpa
CC: Richard C. Sheenhan, Esq.
Steven H. Lupin, Esq.
Joanne R. Denworth, Esq.

MEMORANDUM OPINION AND ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA FILED DECEMBER 19, 1983

IN THE COMMONWEALTH COURT OF PENNSYLVANIA
NO. 1741 C.D. 1981

MOYER'S LANDFILL, INC.,

Appellant

v.

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP,

Appellee

BEFORE: HONORABLE JOHN A. MacPHAIL, Judge

HEARD: November 21, 1983

OPINION NOT REPORTED

MEMORANDUM OPINION BY JUDGE MacPHAIL
FILED December 19, 1983

On September 14, 1982, this Court entered an order in *Moyer's Landfill, Inc. v. Zoning Hearing Board of Lower Providence Township*, 69 Pa. Commonwealth Ct. 47, 450 A.21 273 (1982)[1] directing the zoning authorities of Lower Providence Township (Township) to issue a permit to Moyer's Landfill, Inc. (Moyer's) for the operation of a sanitary landfill on a tract of land containing 131 acres adjoining another tract of 47 acres upon which Moyer's had been conducting a landfill since 1974.[2] The subject tract is located in what was, at the time the zoning

proceedings were commenced, an I-Industrial zoning district. By an amendment to its zoning ordinance in 1977, the Township provided that sanitary landfills would be permitted uses in the I-Industrial district as a special exception. This amendment occurred after Moyer's had filed a constitutional challenge to the zoning ordinance on the basis that it excluded the legitimate use of land for the operation of a sanitary landfill. On December 13, 1982, the Township again amended its zoning ordinance by rezoning the area in which the subject tract is located as an R-1 Residential district. A sanitary landfill is not a permitted use in R-1 districts.

The matters now before us consist of: (1) the petition of Providence Builders, Inc. (PB) and Alternate Energy Store, Inc. (AES) for (a) an order of this Court to enforce its prior order of September 14, 1982 by directing the zoning authorities of the Township to issue a permit for the sanitary landfill to them and (b) permitting them[3] to be substituted as parties in the within action and (2) the motion of the Township to dismiss the petition of PB and AES because they are not proper parties before this Court.

It must be explained that the tract of land which was the subject of our order of September 17, 1982 was owned at all pertinent times by PB and, according to testimony we received, is still owned by that corporation. Since our order of September 14, 1982, it appears that Moyer's has defaulted on its real estate installment sale agreement with PB. AES avers that pursuant to an option agreement with Moyer's, it has taken by assignment Moyer's rights as the purchaser of the subject tract under the real estate installment sale agreement. Because AES now stands in the shoes of Moyer's, it contends that it may be substituted as the real party in interest in the action which was adjudicated in 1982, and is entitled to have the zoning permit in question issued

to it. AES, indeed, applied for that permit to the Township. The zoning officer refused to approve the application asserting that (1) the permit had already been issued and returned to the Township and (2) the tract has been rezoned R-1, a classification which would not permit a sanitary landfill at the time AES submitted its application.

The Township presented evidence that when a receiver was appointed for Moyer's in proceedings in federal court, that receiver applied for and was granted a special exception permit by the Township to permit a landfill on the subject tract. On March 18, 1983, that permit was returned by the receiver to the Township. It is the Township's position that they have complied with our order of September 14, 1982 by issuing that permit and that no permit for a sanitary landfill may now be issued for the tract which, as we have noted, has since been rezoned.

Some of the lesser issues in this case have been resolved by a prior decision of this Court. In *Raum v. Tredyffrin Township Board of Supervisors,* 29 Pa. Commonwealth Ct. 9, 370 A.2d 777 (1977) we held, *inter alia,* that (1) this Court has the inherent power to issue an appropriate order in aid of our judgment where one of the parties refuses to abide by a decision of the Court and (2) where we have ordered that a petitioner be permitted to proceed under a zoning ordinance, that petitioner cannot be denied his right by a subsequent change in the pertinent zoning ordinance. *See also Casey v. Zoning Hearing Board,* 459 Pa. 219, 325 A.2d 764 (1974).

It must be observed, of course, that a zoning permit for land use pertains to the tract of land itself. If land has been approved for a specific use, it matters not in whose name the permit is issued, Ryan, *Pennsylvania Zoning Law and Practice* §9.4.18 (1981), and

under normal circumstances, any person having a proprietary interest in the subject land, could claim the permit or exercise the rights granted to the named permittee. If AES was the successor in interest to Moyer's, therefore, the mere fact that it was not the named applicant or permittee would not in and of itself bar its right to claim the permit.

The Township contends, of course, that when it issued the special exception permit to the receiver, it was complying with the order of this Court. Since the permit clearly spelled out that unless building commenced within six (6) months the permit would expire, all of Moyer's rights and those who succeeded in interest thereto terminated at the end of six (6) months from the date of issuance.[4] If this was the usual case where a special exception permit had been requested and granted, the Township clearly would prevail. As we have already indicated, however, this is far from the usual case.

We deem it necessary to first review what it was that this Court ordered in September of 1982. While it is true that we discussed both the constitutional challenge to the ordinance and the subsequent amendment permitting the use of the subject tract as a sanitary landfill by special exception, our order clearly was intended to provide that a zoning permit be granted to the applicant. The discussion of the special exception aspect of the case was after we had already decided that the constitutional challenge should be sustained. At the time that challenge was made, the zoning ordinance excluded sanitary landfills. The Township's subsequent amendment was an effort to rehabilitate its ordinance after the proceedings challenging it had commenced and clearly could not remedy the fatal defect as to Moyer's. Our resolution of the special exception issue was secondary to our conclusion that the zoning ordinance was constitutionally infirm.

Having said that, we must recognize, at the same time, that we *did* hold that Moyer's was entitled to a special exception permit as well. It is necessary then, for us to consider at this time whether the issuance of such a permit by the Township to the receiver for Moyer's was full compliance with our order.

There can be no doubt that a receiver stands in the legal "shoes" of the debtor and, subject to court approval, may exercise all of the legal rights of the debtor. From the chronological recitation of events in the brief of Petitioners, we learn that the receiver was appointed for Moyer's on July 16, 1982. Although there was an installment sales agreement and two (2) option agreements executed February 27, 1981 by the terms of which AES now asserts that it has succeeded to the rights of Moyer's, there is nothing in the chronological statement of events or in the evidence presented at the hearing we held on the instant petitions, which would indicate when AES *exercised* its rights under the option agreements.[5] The installment sales agreement between AES and PB for the subject tract is dated February 28, 1983. We conclude, therefore, that on September 29, 1982, when the receiver requested that the special exception permit be issued, she, as receiver, and no one else, was the real party in interest entitled to that permit.

Petitioners point out that the receiver previously had represented to this Court in a petition for a stay order submitted before our decision of September 12, 1982, that Moyer's would not be in a position to proceed with the permit because of insolvency. That allegation is made, presumably, to indicate that the receiver may have acted in bad faith when she, later requested the permit. We think that the most that could be said is that the receiver changed her mind.

Memorandum Opinion and Order

We hold that the issuance of the special exception permit by the Township to the receiver was literal compliance with our order of September 14, 1982. The receiver could have asked for a "zoning permit" rather than a special exception permit[6] but she did not. Her failure in that respect cannot now be seized upon by petitioners to compel the Township to issue yet ancther permit pursuant to our order.

The final question to be resolved is whether the return of the special exception permit by someone authorized by law to act for the named permittee constitutes a cancellation or abandonment of that permit. Here, Petitioners confront us with an agreement dated May 11, 1983 by the terms of which the receiver acknowledges that AES has taken by assignment the rights of Moyer's under Moyer's agreement with PB, and by the terms of which the receiver disclaims any interest in permits for the landfill in subject tract. In our judgment, the receiver was giving up permit rights she no longer had and her recognition of AES as the real party in interest as of May 11, 1983 is after the fact.

We have no difficulty ascertaining that feelings of the litigants if this case are very strong. We realize that our decision today is a declaration that Moyer's won the battle but lost the war. On the other hand, we see no evidence that the Township did anything other than what our order permitted and directed it to do. Hints of complicity between the Township and the receiver are insufficient for us to impose sanctions in the within matter.

Inasmuch as we have disposed of this matter on the merits of the Petitioners' petition, we need not address the Township's motion to dismiss.

s/ John A. MacPhail
John A. MacPhail, Judge

FOOTNOTES

1 Petition for allowance of an appeal to the Pennsylvania Supreme Court was denied January 14, 1983.

2 Moyer's had an equitable interest in the 131 acre tract as a purchaser in an installment sale contract.

3 Although PB and AES are joint petitioners and are referred to in this opinion as Petitioners, it is apparent from the evidence taken by this Court and the pleadings that PB has yielded whatever rights it may have had as a landowner to Moyer's and/or AES.

4 When the receiver returned the permit to the Township, she said it was being returned "since I do not intend to make use of this permit".

5 Both option agreements provided that the option should be exercised by AES giving written notice to the optionors (Moyer's and PB) of their intention to exercise the option.

6 There is nothing to indicate one way or the other whether under the Township's ordinance a similar time restriction may have been applicable to zoning permits which were other than special exception permits.

Memorandum Opinion and Order

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 1741 C.D. 1981

MOYER'S LANDFILL, INC.,

Appellant

v.

ZONING HEARING BOARD OF L0WER PROVIDENCE TOWNSHIP,

Appellee

ORDER

The petition of Providence Builders, Inc. and Alternate Energy Store, Inc. for enforcement of court order and for substitution as parties in the within matter, is denied.

DATE: December 19, 1983

s/ John A. MacPhail
John A. MacPhail, Judge

CERTIFIED FROM THE RECORD
December 19, 1983
s/ Francis C. Barbush
Chief Clerk

OPINION AND ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA FILED SEPTEMBER 14, 1982

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1741 CD. 1981

MOYER'S LANDFILL, INC.,

Appellant

v.

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP,

Appellee

BEFORE:

HONORABLE JAMES CRUMLISH, JR., President Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE GENEVIEVE BLATT, Judge
HONORABLE DAVID W. CRAIG, Judge
HONORABLE JOHN A. MacPHAIL, Judge

Argued: June 8, 1982 — Philadelphia

OPINION BY JUDGE ROGERS FILED: September 14, 1982

Moyer's Landfill, Inc. (Moyer), a landowner which seeks zoning approval to use its land in Lower Providence Township, Montgomery County, as a sanitary landfill, and the township[1] have each appealed from an order of the Court of Common Pleas of Montgomery County. The order complained of reversed the

township zoning hearing board's decision that Moyer was required to pay the fees of lawyers and an engineer employed by the township in opposing Moyer is applications; but upheld the board's decision that Moyer was not entitled to establish the proposed sanitary landfill.

THE TOWNSHIP'S APPEAL

Lower Providence Township's appeal raises the question of the propriety of the trial court's holding and order that the fees of the township's and the zoning hearing board is solicitors and the township's consulting engineer for services in the zoning litigation, in a total amount in excess of $25,000, could not be charged to Moyer. We affirm this aspect of thc trial court's order. Section 907 of the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, (MPC) 53 P.S. §10907 authorizes zoning hearing boards to employ legal counsel "[w]ithin the limits of funds appropriated by the governing body." The matter of the fees of a zoning hearing board's counsel was the subject of *Borough of Brookhaven v. BP Oil Company*, 48 Pa. Commonwealth Ct. 128, 409 A.2d 494 (1979), where we held that Section 907 provided sufficient indication that the legislature did not intend that the fees of zoning hearing board solicitors should be charged to the persons who present causes for zoning hearing board decisions.

Section 618 of the MPC, 53 P.S. §10618, authorizes the governing body to appropriate money to support or oppose decisions of the zoning hearing board. The township solicitor's participation in this case was directed entirely to opposing Moyer' s applications for board and court approval of its project. His fees for thus representing the township were properly payable by the township and not properly chargeable to Moyer as a cost of

the proceedings. The township engineer's services were to the same purpose and he must also be paid by the township.

MOYER'S APPEAL

In its appeals from the denial of its zoning applications first, to the zoning hearing board and then to the common pleas court, Moyer raised, among others, the questions of: (1) whether the township zoning ordinance at the time Moyer applied for the zoning permit was without effect because it unconstitutionally excluded from the township the legitimate use of land for the establishment and operation of a sanitary landfill and (2) whether Moyer was entitled to a special exception to use its land for a sanitary landfill.[2] These claims will be the principal subjects of this opinion.

In 1974, Moyer acquired a tract of land containing about 47 acres of land in Lower Providence Township on which it has since conducted a sanitary landfill. For many years before Moyer's acquisition — before there was any zoning in Lower Providence Township or any state regulation of dumping sites and activities — part of this tract was used by its then owners as a dump. After zoning was adopted in Lower Providence Township in 1955 the dumping enterprise continued as a nonconforming use. The zoning ordinance totally excluded the use of land for dumps or sanitary landfills, as they properly came to be called after the imposition of state regulations; further, only residential uses were permitted in the zoning district in which the site was placed.

When, in the late 1960's state regulation of sanitary landfills by statute and rules promulgated first, by the State Department of Health and later and presently by the Department of Environmental Resources (DER), improvements were made to

the 47 acre dump and in the methods of its operation. These included the installation of drains, seepage pits and the daily covering of the waste with earth.

In 1971, the then owner of the existing 47 acre, now landfill[3], filed with DER a so-called Phase I module, the initial requirement for landfill licensing, with respect to the tract of land which is the subject of this litigation. This tract adjoins the existing landfill and contains 131 acres. It was, and remains, located in Lower Providence's I-Industrial zoning district, in which until after the litigation commenced only "commonly known industrial manufacturing pursuits" were permitted uses.

In 1977, the 47 acre site had a remaining useful life as a sanitary landfill of only five to eight years.

In that year, the appellant Moyer by agreement of purchase acquired equitable ownership of the 131 acre tract.

Having been since 1974 the owner and operator of the 47 acre site and being now the equitable owner of the 131 acre tract, Moyer then formed the purpose of using the 47 acre site until its capacity was exhausted and of then moving to the 131 acre new site and using it for sanitary landfill purposes in parcels of four to five acres each, one at a time, for about five years each, until the capacity of the new tract for landfill purposes would be exhausted in about 45 years. It proposed that the parts of the 131 acre tract not actually devoted to waste disposal would be used to provide cover soil or for buffering the operation from neighbors. To these ends Moyer had engineers prepare and file with DER the more detailed Phase II module for the 131 acre tract. The construction and mode of operation proposed would conform with DER regulations and would include the provision

of a liner beneath, and a covering or earth atop, each layer of waste spread upon the four or five acre tract being used for waste disposal and all other features required by DER.

Moyer applied to the zoning officer of Lower Providence Township for permission under the zoning ordinance to use the 131 acre tract for sanitary landfill purposes in early 1977. The application was refused. Moyer then filed with the zoning hearing board an appeal from the zoning officer's action refusing the permit, challenges to the substantive validity of the zoning ordinance and other applications with which it is not necessary to burden the body of this opinion. The zoning hearing board conducted 25 hearings beginning in May, 1977 and ending in May, 1978.

In August, 1977, while the zoning board hearings were in progress, the Board of Supervisors of Lower Providence Township enacted an amendment to the zoning ordinance providing that "solid waste disposal facilities, sanitary landfiills and incinerators" should thereafter be permitted uses in the I-Industrial zoning district when authorized as a special exception. Moyer applied for and obtained from the zoning hearing board leave to amend its zoning case to add an application for a special exception.

The zoning hearing board rejected all of Moyer's requests for relief. Moyer appealed this action to the common pleas court, which on application of the township heard additional evidence and by order filed on June 23, 19B1 affirmed the zoning board's action. This appeal followed, requiring us to review the record for error of law or abuse of discretion by the court. *Richman v. Zoning Board of Adjustment,* 391 Pa. 254, 137 A.2d 280 (1958).

As we have noted, Moyer asserts that the zoning ordinance of Lower Providence Township unconstitutionally totally excluded

landfills at the time it applied to use the 131 acre tract for landfill purposes. The hearing judge decided this question against Moyer on the authority of language in *Davis v. Board of Supervisors of Easttown Township*, 32 Pa. Commonwealth Ct. 343, 379 A.2d 645 (1977), where Judge, later Justice, Roy Wilkinson, Jr., after pronouncing the holding of the case to be that on the facts presented the appellant municipality, whose zoning ordinance had been judicially declared to be unconstitutional for totally excluding a proposed multi-family use, could not, until the ordinance was cured, refuse on the ground of the ordinance an application for a second proposed multi-family use, wrote the following dictum:

> [i]t is possible, however, that at some future time a court of common pleas, confronted with a challenge to the substantitive validity of a zoning ordinance on a fair share basis, may decide that while the ordinance is invalid *without* the proposed development plan, it is perfectly valid *with* the proposed plan. In other words, the very decision of the court, which invalidates the ordinance at the same time preserves it, albeit in a slightly modified form. (Emphasis in original.)

32 Pa. Commonwealth Ct. at 347, 348, 379 A.2d at 647. The trial judge applied this language to the case at hand and concluded that the presence of Moyer's existing and nonconforming landfill preserved the validity of the ordinance despite its total exclusion of landfills.

The present case, unlike *Davis*, is not about housing needs where the issue is that of whether the ordinance evidences the municipality's purpose not to accept its fair share of the area's residential needs (a subject illuminated and definitively treated

in *Surrick v. Zoning Hearing Board of Upper Providence Township*, 476 Pa. 182, 382 A.2d 145 (1977)); but that of whether the ordinance totally excluded a legitimate business use under the principle announced in *Exton Quarries, Inc. v. Zoning Board of Adjustment*, 425 Pa. 43, 228 A.2d 169 (1967), that such a proscription may stand only where a substantial relationship of the ban to health, safety and the general welfare appears, enlarged upon in *Beaver Gasoline Co. v. Osborne Borough*, 445 Pa. 571, 285 A.2d 501 (1971), first explicitly imposing on the municipality the duty of persuading the tribunal that a total ban of a legitimate business use bore a substantial relationship to the public health, safety, and general welfare. As is evident, the concepts of fair share used in cases involving exclusion of housing types and that of relationship to health, safety and general welfare employed in cases involving exclusion of business uses tend to merge. The existence or a plethora of multi-family dwellings available to persons of low and moderate income may sufficiently show that a municipality has provided its fair share of such use, justifying a present exclusion; and the presence of numbers of enterprises engaged in a particular business may sufficiently demonstrate a substantial relationship to health, safety, and the general welfare, justifying a ban on more. *See Paradise Township v. Mt. Airy Lodge*, ____ Pa. Commonwealth Ct. ____, ____ A.2d ____, (No. 1336 C.D. 1981, filed September 1, 1982), where we declared in a business exclusion case that "non-conforming uses may constitute an element in a total environmental picture justifying an exclusion."

We disagree with the trial court, however, that Moyer's existing landfill alone sufficiently demonstrated a substantial relationship of the ordinance's exclusion of all landfills to the health, safety, and general welfare of the community. As the record shows, the capacity of the existing landfill was limited to four

of five years' use and the new facility was proposed for use only when the existing landfill had reached capacity.

Further, the fact that the township's governing body amended the ordinance to permit the use of the very land which is the subject of this suit for sanitary landfill use by special exception a few months after Moyer filed its challenge, represents the respondent township's decision that the existing landfill was no reason for a total ban.

This aspect of the case — the constitutional validity of the ordinance as it existed when Moyer applied for its zoning permit — is controlled by *General Battery Corporation v. The Zoning Hearing Board of Alsace Township*, 29 Pa. Commonwealth Ct. 498, 371 A.2d 1030 (1977). We there held that a zoning ordinance which made no provision for industry or industry-related uses must fall before the challenge of a landowner desiring to establish a waste disposal facility adjacent to its lead-smelting business, for the reasons: that the showing of a total exclusion of a legitimate business or industrial use of land overcomes the presumed validity of a zoning ordinance; that the presumption of validity being overcome, the burden shifts to the municipality to establish the legitimacy of prohibition by establishing what interest within the police power is sought to be protected; that industrial waste disposal facilities are a legitimate use of land, that is, not a use the total exclusion of which is prima facie designed to protect public health, safety and welfare; that the municipality was required to establish that by totally exluding waste disposal facilities it endeavored to protect public interests which the zoning statutues permit it to protect; and that it did not accomplish this by showing only that the specific waste disposal facility might have detrimental effect. We reproduce portions of *General Battery:*

We hold that the total exclusion of industrial waste disposal facilities in Alsace Township shifts the burden of proof to the municipality. In this connection, we note the comprehensive role of an active and proficient department of this Commonwealth which has been entrusted with the duty of controlling and supervising the type of activity with which we are concerned. Under the authority of the Pennsylvania Solid Waste Management Act,[4] the Pennsylvania Department of Environmental Resources is given broad power to regulate waste disposal systems. In addition, the Department is authorized to use a wide variety of methods to protect and preserve the quality of our water.[5] Under these circumstances, we conclude that waste disposal facilities do not have the obvious potential for polluting air or water or otherwise creating uncontrollable health or safety hazards. Nor do common knowledge and experience suggest other clearly deleterious effects which would inevitably be visited upon the public in general. We therefore conclude that waste disposal facilities under the diligent control of the Department do not embody a use, the total exclusion of which appears prima facie to be designed to protect the public health, safety and welfare. Concomitantly, the burden shifts to Alsace Township to justify the exclusionary zoning ordinance.

We hold that Alsace Township has not carried its burden. In particular, we are unpersuaded that the township has established that by excluding the

activity in issue it endeavored to protect those public interests which zoning statutes permit municipalities to protect. Before the Board, the township sought by cross examination of General Battery's witnesses to establish that the specific disposal facility contemplated, a landfill with a liner and a system of tanks designed to protect against the possible leaching into the soil of compounds produced in General Battery's lead-smelting operations, might have detrimental effects. However, this evidence, dealing as it does with the application of the ordinance to General Battery's proposed use of its land, is not dispositive on the issue of the ordinance's racial invalidity. Obviously, a zoning ordinance may be invalid as a whole although not in relation to specific property. . . . We conclude that whether a possibility exists that General Battery's activity might have detrimental effects does not justifiy a total exclusion of all industrial waste disposal facilities.

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4. Act of July 31, 1968, P.L. 788, *as amended*, 35 P.S. §§6001-6017.

5. *See* Act of June 22, 1937, P.S. 1937, *as amended*, 35 P. S. §691. 1 et seq. (known as The Clean Streams Law).

29 Pa. Commonwealth Ct. at 502-503, 371 A.2d at 1032. (Citation omitted.)

All of this is applicable to the circumstances of this case. The statutes cited govern the establishment and operations of sanitary landfills as well as depositories of industrial waste, DER's regulatory powers have been extensively exercised with respect to sanitary landfills and, as this record shows with respect to Moyer's existing landfiill, are diligently pursued. Further, the township's whole case was devoted to attempting to establish that to permit Moyer to establish its landfill operation on the 131 acre site would have detrimental effect at the site and its environs whereas Moyer's constitutitonal challenge was to the facial validity of the ordinance, not to its effect upon the use of this property. There is little or nothing concerning the township or the region as a whole, its population, its present and likely future land use development, or other characteristics from which any conclusion concerning the general public interests which might be benefited by the total exclusion of sanitary landfills could be formed. In this respect, the case presented by the municipality here is much different from that endeavored to be made, but found wanting, by the township whose ordinance totally excluding quarrying was struck down in *Exton Quarries, supra.*

In short, because the zoning ordinance totally prohibited the use of land for the conduct of the legitimate business of operating sanitary landfills,[4] and because the township failed to prove that the ordinance bore a substantial relationship to health, safety, and welfare, it was unconstitutional. It follows that Moyer is entitled to the definitive relief of an order directing that its requested zoning permit be issued. *Case v. Zoning Hearing Board of Warwick Township,* 459 Pa. 219, 328 A.2d 464 (1974).

The trial court, having rejected Moyer's constitutional challenge, then considered the matter of whether Moyer was entitled to a special exception and again ruled in the township's

favor, concluding that the proposal would be detrimental to health, safety and welfare. Again, we are constrained to disagree. The applicant who shows that the use he proposes is permitted by special exception and that the specific requirements of the ordinance are met has demonstrated that what he proposes is something which the governing body of the municipality has determined should be allowed, is appropriate, and presumptively consistent with health, safety and general welfare. *Archbishop O'Hara's Appeal,* 389 Pa. 35, 131 A.2d 587 (1957). The burden of persuasion that general non-objective standards contained in the ordinance, the only kind appearing in the Lower Providence Zoning ordinance, cannot be complied with is on the party objecting to the application.[3] *Borden Appeal,* 369 Pa. 517, 87 A.2d 465 (1952); *Zoning Hearing Board v. Konyk,* 5 Pa. Commonwealth Ct. 466, 290 A. 2d 715 (1972). A use permitted by special exception is a permitted use, and the burden of persuasion that health safety and welfare will be adversely affected is not satisfied by showing affects no different from or greater than those which normally attend the thus permitted use. *Archbishop O'Hara's Appeal, supra; Lower Providence Township & Wood v. Ford,* 3 Pa. Commmonwealth Ct. 380, 283 A.2d 731 (1971).

A review of the whole of this vast record compels the conclusion that the township's evidence consisted in the main of complaints of persons resident in the vicinity of the existing landfill of occasional litter on the roads near the site, of truck traffic, of inadequate maintenance of the roads near the site assertedly damaged by truck traffic, of the occasional sound of bulldozers working at the site, of occasional odors and of the assertedly unsightly hill which would be created as successive layers of liners, waste and soil were placed on the site. There is no evidence that these, effects are other than those which occasionally normally

attend sanitary landfills and, indeed, since they were all descriptive of events at the existent site must have been things known to the governing body when it made the legislative judgment that the land adjacent to that site was an appropriate location for the landfill use.

The evidence given by the township's expert witness, a civil engineer who had been once employed as a hydrologist by DER and who during that employment had been occasionally called upon to review and consult on landfills "so far as they were affecting the ground and water resources," is unpersuasive. He testified that the Phase I module approved in 1972 would not as of the date of hearing in 1977 be approved because of new regulations including the requirement of a liner which he himself pointed out is included in Moyer's design proffered at the hearing; that a more appropriate site for a landfill would be a depression, not this level site; that he did not think that there was sufficient cover material on the site; that the site is underlain with rock which would be very hard" to excavate and that he did not think that the site was appropriate because there could be problems with leachate getting into ground water and tributaries of streams in the vicinity; and that there might also be problems from rain water run-off. All of these matters are the subject of DER requirements which must be met before licensing and of regulation "and sanction, including closure action, after operations are begun. Most of them were surely things within the ken of the governing body when, during these proceedings, it amended the zoning ordinance so as to permit use of this tract for a sanitary landfill. The township's evidence fell short of proving by the standard required by the law that the proposed landfill would be so detrimental to health, safety and welfare of the community that the special exception should not have issued.

Opinion and Order

We will affirm the order below insofar as it disallows the imposition of the township's costs for services of its and the zoning hearing board's counsel and of its consulting engineer upon the petitioner; we reverse the order below insofar as it affirms the order of the zoning hearing board denying Moyer's application for a zoning permit and we remand the record with direction that the zoning permit as applied for be issued.

s/ Theodore O. Rogers

Judge MacPhail concurs in result only.

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1. An association of neighbors participated in some of the zoning hearing board hearings, but not, it seems, in the appeal to the common pleas court and certainly not in the appeal to this court.

2. The additional grounds upon which Moyer asserted that it was entitled to conduct its operations on its new land and the reasons why we believe that the common pleas court properly rejected them are:

> (a) That the state had wholly preempted the subject of solid waste management by the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P.L. 788, *as amended,* 35 P.S. §6001 et seq. (repealed), and its successor the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, 35 P.S §6018.101 et seq. and that the township had no power by zoning or otherwise to impose any regulation. Since the acts depended on contain no explicit language evincing a legislative intent to override zoning regulations, there was no preemption. *City of Pittsburgh v. Commonwealth,* 468 Pa. 174, 360 A.2d 607 (1976). *Greene Township v. Kuhl,* 32 Pa. Commonwealth Ct. 592, 379 A.2d 1383 (1977), is directly on point.
>
> (b) That when in 1972 Moyer applied for a zoning permit the use of land for a sanitary landfill was permitted in the I- Industrial zoning district under Section 701 of the Lower Providence Township zoning ordinance allowing "commonly known industrial manufacturing pursuits when approved

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by the Zoning Board of Adjustment." We agree that the operation of a landfill is not a commonly known industrial manufacturing pursuit.

(c) That Section 701 of the zoning ordinance unlawfully delegates zoning powers to the zoning hearing board and therefore is without effect. In *Lower Providence Township & Wood v. Ford,* 3 Pa. Commonwealth Ct. 380, 283 A.2d (1971), we held that Section 701 properly construed, merely permits commonly known industrial manufacturing uses when authorized by special exception granted by the zoning hearing board.

(d) That Moyer was entitled to a variance. This application was properly refused by the zoning board for want of a showing of unnecessary hardship.

3. This was Howard Moyer, Jr. who later became and remains a principal of the appellant Moyer Landfill, Inc.

4. The township does not contest the legitimacy of the business of the operating sanitary landfills, nor could such a contest prevail. Sanitary landfills are the subject of more than 220 pages of DER regulations appearing at 25 Pa. Code §75.1 et seq.

5. Section 702.203 of the amendatory ordinance adopted in August, 1977, first lists by name, under letters a through d, uses permitted in the I-Industrial district by special exception, including sanitary landfills; it then under the letter e also permits any other uses of the same general character provided that the applicant

shows that provision has been made adequately to reduce "noxious, offensive, dangerous or hazardous features." This provision seems only to apply to uses other than those specifically named. In any case, Moyer's engineering witness whose designs for the landfill were submitted, testified that he had provided every feature required by DER regulations, which as a perusal of the regulations reveals, are directly to the purpose of reducing noxious, offensive, dangerous or hazardous features of sanitary landfills.

Opinion and Order

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MOYER'S LANDFILL, INC.,

Appellant

v.

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP,

Appellee

ORDER

AND NOW, this 14th day of September, 1982, the order of the court of common pleas dated June 23, 1981, insofar as it excludes from the costs chargeable to the petitioner those for the township and zoning hearing board solicitors and the township's consulting engineer, is affirmed; the said order insofar as it affirms the decision of the zoning hearing board upholding the denial of the zoning permit sought by the petitioner is reversed; and the record is remanded with direction to the zoning authorities of Lower Providence Township to issue the zoning permit.

s/ Theodore O. Rogers, J.

CERTIFIED FROM THE RECORD
SEP. 14, 1982

s/ Frances C. Barbush
Chief Clerk

ORDER OF LOWER PROVIDENCE TOWNSHIP ZONING BOARD DATED JANUARY 19, 1983

BEFORE THE ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

RE: APPLICATION OF ALTERNATE ENERGY STORE, INC. (181-1)

I. HISTORY

The applicant Alternate Energy Store, Inc. filed an application before the Lower Providence Township Zoning Hearing Board requesting a special exception under the terms of the I Industrial Zone of the Ordinance to establish a surface mine or quarry on a 130 acre tract of land located at Visitation Road and Grange Avenue, known as the Troop Farm. The applicant further requested in the alternative, that if the Board were to determine that they were not eligible for a special exception under the terms of the Lower Providence Township Zoning Ordinance, that the applicant would then challenge the substantive validity of the Ordinance in that a proposed legitimate business use that is surface mines or quarries, were totally excluded from Lower Providence Township.

The applicant also challenged the constitutionality of the fee schedule for substantive validity challenges in Lower Providence Township.

During the course of numerous hearings held on this application, the applicant withdrew its request for a special exception as outlined in application No. 81-1 and decided to proceed with the substantive validity challenge to the zoning ordinance.

While the hearings were still in progress the applicant filed a new application No. 81-3. This application requested a special exception from the terms of the zoning ordinance alleging that the proposed use as a quarry or surface mine is of the same general character as the uses permitted in Sections 702.201 and 702.203 A-D and would therefore be eligible for a special exception.

At the request of the applicant this application for a special exception indexed at No. 81-3 has been held in abeyance until the conclusions of the hearings in regard to the substantive validity challenge.

II. FINDINGS OF FACT

1. The applicant is Alternate Energy Store, Inc., a Pennsylvania Corporation whose address is 800 E. Main Street, Lansdale, Pennsylvania 19446.

2. The applicant is an option holder on an irregularly shaped lot with an area of approximately 131.5 acres located at Visitation Road and Grange Avenue in Lower Providence Township.

3. The subject premises have a frontage on Visitation Road northern boundary of approximately 1600 feet.

4. The subject premises are zoned industrial with all adjacent property being zoned residential.

5. The applicant challenges the substantive validity of a Lower Providence Township Zoning Ordinance on the basis that surface mines or quarries, which are a legitimate business uses, are totally excluded from Lower Providence Townhip and therefore, the Township Zoning Ordinance is unconstitutional.

6. The applicant also challenges the validity of Ordinance No. 273 prescribing fees for substantive validity challenges alleging that the fee schedule is unconstitutional.

7. Surface mining or quarrying are not a specifically prohibited use in the Lower Providence Township Zoning Ordinance.

8. Surface mining or quarrying are not a specifically prohibited use in Ordinance No. 226 which governs industrial districts under the Lower Providence Township Zoning Ordinance.

9. The applicant's proposal of a surface mine or quarry is consistent with the types of uses outlined in the intent provisions of Section 702-100 I Industrial District of Ordinance No. 226.

10. A surface mine or quarry is of the same general character as the uses permitted in Section 702.201 of Ordinance No. 226.

11. A surface mine or quarry is of the same general character as the uses listed in Section 702.203 A through D of Ordinance 226.

12. A surface mine or quarry is a permitted use by special exception pursuant to the terms of a Lower Providence Township Zoning Ordinance.

13. Blasting is not required in order to develop and maintain an economically liable surface mine or quarry operation.

14. The applicant's proposal to surface mine or quarry on the Troop Farm for which they have received a DER permit does not permit any blasting.

Order

15. Lower Providence Township, through its Code of Ordinances and in particular Ordinance No. 60 permits blasting in Lower Providence Township.

16. Section 700.303, Control of Noise, of Ordinance No. 226 which governs Industrial Districts, is only applicable to Industrial tracts which border on residential or commercial office districts and not on adjoining industrial tracts or seven other area classifications under the Lower Providence Township Zoning Ordinance.

17. An economically viable quarry or surface mine could be operated even if blasting were necessary within the parameters and requirements of Section 700.303 Control of Noise of Ordinance No. 226.

18. An economically viable surface mine or quarry could be operated even if blasting were done within the parameters and requirements of Section 700.306 Control of Vibration of Ordinance No. 226.

19. The fees charged for a substantive validity challenge pursuant to Ordinance No. 273 are fair, reasonable and directly related to the townships cost for such substantive validity challenges.

20. The applicant presented no evidence to establish that the fee schedule provided for in Ordinance No. 273 is unreasonable, discriminatory or in any manner unconstitutional.

III. CONCLUSIONS OF LAW

1. A surface mine or quarry is a permitted use by special exception pursuant to Section 702.203, subsection E. of Ordinance No. 226 of the Lower Providence Township Zoning Ordinance.

2. The fee schedule of Ordinance No. 273 is fair, reasonable statutorily authorized and in no way unconstitutional.

3. The Lower Providence Zoning Ordinance, since it permits by special exception a surface mine or quarry, which is a legitimate business use, is therefore not exclusionary and therefore is entirely constitutional.

IV. DISCUSSION

The applicant has presented to the Zoning Hearing Board a substantive validity challenge to the Lower Providence Township Zoning Ordinance on the basis that a surface mine or quarry which is a legitimate business use which cannot be lawfully excluded from the township.

Initially, it should be noted that there is not any specific prohibition in any provision of the Township Zoning Ordinance of a surface mine or quarry. Since there is no specific exclusion of surface mines or quarries, the applicants argument is that there is a defacto exclusion of surface mines or quarries under the provisions of the Lower Providence Township Zoning Ordinance. A zoning ordinance is entitled to the presumption of constitutionality. The applicant by alleging a defacto exclusion has a very heavy burden of proof in establishing a defacto exclusion and the unconstitutionality of the Lower Providence Township Zoning Ordinance. *Hammermill Paper Company vs. Greene Township* 39 Pa. Cmwlth. 212, 395 A.2d 618 (1978).

Order

The tract of land in question is zoned "I" Industrial District pursuant to Ordinance No. 226. Section 700.100 describes zoning ordinance: . . . .

> " . . . INTENT—The I -Industrial District is established as a district in which the principal use of land is for heavy industrial establish ments, which may create some nuisance, and which are not properly associated nor compatible with residential, institutional, commercial and service establishment . . ."

Section 702.203, Uses by Special Exception of Ordinance No. 226, Subsection E, provides as follows:

> . . ."Any other use of the same general character as the above permitted uses" . . .

The discretion in determining what uses are of the same general character as the above permitted uses under the provision of Section 700.203 and thus permitted by special exception reside in the Zoning Hearing Board pursuant to the provisions of the Lower Providence Township Zoning Ordinance and the Pennsylvania Municipalities Planning Code.

In determining whether a proposed use is permitted by special exception the law requires that in the interpretation of language that the least restrictive interpretation on the use of land by the land owner be selected and that any doubt or ambiguity be resolved in favor of the land owner attempting a legitimate use with his property. *Appeal of Haff,* 448 A.2d 120 (1982). *Board of Supervisors of Lower Providence Township vs. Ford,* 3 Pa. Cmwlth. 380, 283 A.2d 731 (1971).

Order

Applying these legal principles the Board determined the proposed surface mine or quarry is of the same general category as the uses permitted under Section 702.201 and Section 702.203 and therefore would be eligible for a special exception. Since the proposed surface mine or quarry is a permitted use by special exception, clearly, the Zoning Ordinance is not exclusionary and hence is constitutional.

The applicant further alleges, in support of its argument of defacto exclusion, that the requirements in the Industrial District which relate to control of noise and control of vibration would effectively preclude blasting which is a necessary prerequisite to a viable quarrying operation. This argument is totally without merit.

Initially, it should be noted that even the proposal of the applicant does not require any blasting. The applicant has received a permit from DER for a surface mine or quarry on the location of the Troop Farm. That permit was issued with the understanding that the applicant would not need to engage in blasting. Certainly it is preposterous for the applicant to argue defacto exclusion because blasting is prohibited when even its own proposal for which it has received a permit, does not require blasting.

The evidence presented by the expert for the township established that no blasting would be required in order to have a viable economic quarry. Likewise, the township's expert also established that even if blasting were necessary that such blasting could be done within the provisions of Section 700.303 of Ordinance No. 226 relating to control of noise and Section 700. 306 relating to control of vibration.

Determinations as to the credibility of witnesses and the weight to be given to the evidence are matters left solely to the Board

in the performance of its fact finding role. *Borough of Youngsville vs. Zoning Hearing Board,* Pa. Cmwlth. 450 A.2d 1086 (1982).

This Board determines the issue of credibility in favor of the extremely well qualified expert presented by the township and finds not a scintilla of evidence to support the rather novel theory that either blasting is required in all situation involving quarries or surface mines or that blasting could not be accomplished within the parameters of the existing restrictions of the Township Zoning Ordinance.

The applicant also challenges the fee schedule outlined in Ordinance No. 273 of the Township Zoning Ordinance. The applicant alleges that the fee schedule for substantively validity challenges is unconstitutional. No evidence was presented by the applicant in support of this rather unique charge. The township's evidence established that the fee schedule outlined in Ordinance No. 273 for substantive validity challenges is based upon a conservative estimate of the cost which the township absorbs for these hearings. No charge for counsel fees are included in the fee charged to the applicant.

The fee schedule is applied to all applicants in a uniform fashion. No evidence was presented by the applicant to establish either that these fees were not statutorily authorized or that they were in any manner unconstitutional.

All ordinances are entitled to a strong presumption of constitutionality. The applicant has a very heavy burden of proof in establishing the unconstitutionality of this ordinance.

Since no evidence was presented to establish that the fee schedule is violative to any provision of the Pennsylvania or the

United States Constitution, the Board must conclude that the fee schedule for substantive validity challenges as outlined in Ordinance No. 273, of Lower Providence Township Zoning Ordinance is entirely authorized and constitutional.

Considering the totallity of circumstances and the heavy burden of proof based upon the applicant to prove a defacto exclusion, the Board finds that there is no defacto exclusion of surface mines or quarries and that in fact, a surface mine or quarry is permitted by special exception and therefore the Lower Providence Township Zoning Ordinance is entirely constitutional.

ORDER

The substantive validity challenge of Alternate Energy Store, Inc. to the Lower Providence Township Zoning Ordinance on the basis that surface mines or quarries are excluded from that Ordinance is hereby dismissed. The constitutionality of the Lower Providence Township Zoning Ordinance is upheld in its entirety.

The applicant's challenge to the fee scheduled outlined in Ordinance No. 273 of Lower Providence Township Zoning Ordinance is hereby dismissed. The fee schedule of Ordinance No. 275 is fair, reasonable statutorily authorized and entirely constitutional.

Dated: January 19, 1983

LOWER PROVIDENCE
TOWNSHIP ZONING BOARD

s/ (illegible)
Chairman

s/ (illegible)
s/ (illegible)

LOWER PROVIDENCE TOWNSHIP ORDINANCE NO. 208

LOWER PROVIDENCE TOWNSHIP
MONTGOMERY COUNTY, PENNSYLVANIA

ORDINANCE NO. 208

AN ORDINANCE AMENDING ORDINANCE NO. 5, ORDINANCE NO. 78, AND ORDINANCE NO. 196, AND ALL OTHER TOWNSHIP ORDINANCES APPERTAINING TO THE ADMINISTRATION OF THE TOWNSHIP ZONING ORDINANCE; PROVIDING FOR CHANGES IN TERMINOLOGY; DEFINING THE DUTIES OF THE ZONING OFFICE CONCERNING PROCESSING OF APPLICATIONS AND ENFORCEMENT OF ZONING ORDINANCE AND SETTING FORTH FEES FOR APPLICATIONS THEREUNDER

The Board of Supervisors of Lower Providence Township, County of Montgomery, Commonwealth of Pennsylvania, do hereby ENACT and ORDAIN:

ARTICLE X

ADMINISTRATION

Section 1000. Zoning Officer, appointment and qualifications: The provision of this ordinance shall be enforced by a Zoning Officer with the aid of the Police Department and other municipal agencies. The Zoning Officer shall be appointed at the first meeting of the Township Board of Supervisors following the adoption of the ordinance to serve until the first Monday of January next following; and shall thereafter be appointed annually to serve a term of one year and/or until his successor is appointed. The Zoning Officer may succeed himself. He shall receive such compensation as the governing body by resolution shall provide.

Ordinance No. 208

Section 1001. Duties and Powers: It shall be the duty of the Zoning Officer and he shall have the power to:

A. Keep a permanent record of all plans and applications for permits, and all permits issued with notations as to special conditions attached thereto. All records shall be open for public inspection and shall be the property of the Township.

B. Review applications for zoning permits for erections or alterations of structures or changes of use, determine whether such construction or use is in accordance with the general requirements of this ordinance, all other applicable ordinances and with the laws and regulations of the Commonwealth.

C. Conduct inspections and surveys to determine compliance or non-compliance with the terms of this ordinance. In carrying out such surveys, the Zoning Officer or his representative may enter upon any land or building.

D. Make written orders requiring compliance with the provisions of this ordinance to be served personally or by registered mail.

E. Institute proceedings in courts of proper jurisdiction for the enforcement of provisions of this ordinance.

F. Maintain a map showing the current zoning classification of all land.

G. Maintain a map and register showing the registration, identification, location, and type of all non-conforming use.

H. Participate in all proceedings before the Zoning Hearing Board, and Board of Supervisors and Township Plan

Commission, when specifically requested, to present facts and information to assist the Board in reaching a decision, resist and oppose any deviations from the standard provisions of this ordinance and have decisions of Board reviewed in a court of proper jurisdiction when, in the judgment of the Zoning Officer, such review is desirable.

Section 1002. Permits: No building or other structure shall be constructed, enlarged, modified, or otherwise altered in the Township, and no use of any structure changed, nor shall any land use be changed, until a permit has been secured from the Zoning Officer.

A. The Zoning Officer shall have authority to issue permits only for construction or land uses which are in accordance with the general requirements of this ordinance.

B. The Zoning Officer shall issue no permits for the construction on or use of any land or structures unless said proposed construction or use also conforms to the requirements of all other ordinances of Lower Providence Township and the law of the Commonwealth of Pennsylvania.

C. Permits for construction and uses which are alleged by applicant to be authorized special exceptions, variances, or non-conforming uses to such requirements of the zoning ordinance of the Township, and its amendments, shall be issued by Zoning Officer only upon order of the Zoning Hearing Board.

Section 1003. Application for Permits: All applications for permits shall be made in writing by the owner or tenants or authorized agent, and shall be filed with the Zoning Officer. The application:

A. Shall include a statement as to the proposed use of the building and/or land.

B. Shall be accompanied by working plans drawn to scale, showing the location of the building in relation to property and road lines.

C. Shall include a statement that the side lines of all roads shown on the plan have been located and staked on the premises by a surveyor or other person competent to give such location.

D. Shall give the name and address of the person who has so located and staked the road lines.

Section 1004. Requirement of Use and Occupancy Permit: A use and occupancy permit shall be required prior to any of the following:

A. Use and occupancy of any building or other structure hereafter erected or altered;

B. Change in use of any building or structure;

C. Use of land or change in the use thereof, except that the placing of vacant land under cultivation shall not require a use and occupancy permit;

D. Change in use or extension of a non-conforming use. It shall be unlawful for any person to use or occupy any building or other structure or land until a use and occupancy permit has been duly issued therefor.

Section 1005. Applications for use and occupancy permits: All applications for use and occupancy permits shall be made in writing on forms furnished by the Township and shall include all information necessary to enable the Zoning Officer to ascertain compliance with this ordinance.

Section 1006. Issuance of Use and Occupancy Permits: No use and occupancy permit shall be issued until the Zoning Officer has certified that the proposed use complies with all the provisions of this ordinance and all other Township ordinances.

Section 1007. Issuance or refusal of permits; appeals: If the Zoning Officer determines that an application is in compliance with the provisions of this ordinance, the Building Code and other pertinent Township ordinances, it shall be his duty to issue the appropriate permit. If he determines that an application is not in compliance with the provisions of this ordinance, or other Township ordinances, it shall be his duty to refuse the permit, in which case he shall instruct the applicant in the method of appeal to the appropriate administrative appellate body.

A. An appeal from the decision of the Zoning Officer shall be taken within thirty (30) days.

Section 1008. Enforcement: The Lower Providence Township Building Inspector, Fire Marshal, Zoning Officer and Plumbing Inspector are hereby granted such police powers as may be necessary to file complaints, informations and citations before the appropriate District Justice. The purpose of this grant of powers is to comply with recent amendments to the Rules of Criminal Procedure.

Ordinance No. 208

A. The grant of the above power to the above-named Lower Providence Township officials shall not in any way be deemed to confer upon them any rights, duties or obligations of police officers of Lower Providence Township with the exception of those powers necessary to properly administer their Township functions. They shall not be considered policemen under the terms of the Police Tenure Act.

Section 1009. Fees: The applicant for any permits authorized by the provisions of this ordinance shall, at the time of making said application, pay to the Zoning Officer for the use by cash payments to the Township, the sum set forth in accordance with the Fee Schedule in Appendix A, adopted by ordinance of the Board of Supervisors upon the enactment of this ordinance or as such Schedule may be amended by ordinance of the Board of Supervisors from time to time hereinafter.

Section 1010. Severability: If any clause, provision, or requirement of this ordinance be declared invalid, such action shall not affect the validity of any other clause, provision or requirement hereof.

Section 1011. Repeal: Article X of the Zoning Ordinance of 1955 and all ordinances inconsistent herewith are hereby repealed.

ENACTED and ORDAINED by the Board of Supervisors of the Township of Lower Providence this 13th day of September, 1976.

BOARD OF SUPERVISORS
Lower Providence Township

Ordinance No. 208

By: Ernest R. Gaugler
Chairman

Attest: Vincent D. Donahue
Secretary-Treasurer

Advertised Proposed Ordinance in Times Herald: August 31, 1976 and September 7, 1976.
Proof of Publication Dated: September 9, 1976.
Hearing Held: September 13, 1976, Regular Supervisors Meeting.
Ordinance Adopted: September 13, 1976.
Ordinance Entered: September 14, 1976, as Ordinance No. 208.
Amended by Ordinances:

PERMIT OF LOWER PROVIDENCE TOWNSHIP

LOWER PROVIDENCE TOWNSHIP

Montgomery County

Pennsylvania

PERMIT

Permit No. 1-83

A special exception permit is hereby given MOYER'S LANDFILL, INC.

To use premises located on Visitation Road and known as the Troop Farm, Lower Providence Township, Montgomery County, Pennsylvania, for a sanitary landfill. Pursuant to Section 1109 of Lower Providence Zoning Ordinance 83, this special exception shall expire if applicant fails to obtain a building permit within six months from the date hereof. Issued pursuant to Commonwealth Court Order dated September 14, 1982 in Moyer Landfill, Inc., Zoning Hearing Board of Lower Providence Township, 174CD1981.

s/ Alan G. Leigh
Building Inspector/Zoning Officer

Dated: January 31, 1983

LETTER FROM RECEIVER DATED MARCH 18, 1983

SUGARMAN & DENWORTH

Attorneys At Law

Suite 510, North American Building
121 South Broad Street
Philadelphia, Pennsylvania 19107
(215) 546-0162

Robert J. Sugarman
Joanne R. Denworth

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Suite 803
1201 Pennsylvania Avenue, 11W
Washington, D.C. 20004
(202) 737-4460
Robert Raymond Elliott, P.C.*
Counsel

* Not Admitted in Pa.

March 18, 1983

Richard Sheehan, Esquire
Township Solicitor
Lower Providence Township
1020 South Park Avenue
Audubon, PA 19401

RE: *Use Permit for the Troop Farm*

Dear Mr. Sheehan:

As Receiver for Moyer's Landfill, Inc., I am returning herewith the Use Permit you sent to me for landfilling on the

Letter from Receiver

adjacent Troop Farm since I do not intend to make use of this permit.

Sincerely,

s/ Joanne R. Denworth

JRD/js
enclosure

LETTER OF JULY 15, 1983 REQUESTING ZONING PERMIT

Law Offices

HAMBURG, RUBIN, MULLIN & MAXWELL

A Professional Corporation

Gerald Hamburg
Edward Rubin
J. Edmund Mullin
J. Scott Maxwell
Steven H. Lupin
Robert Redler
David Kraut
Mark S. Harris
Michael E. Fingerman

800 East Main Street
Lansdale, Pa. 19446-3098
(215) 368-3400 File No. 11,651

July 15, 1983

Alan G. Leigh, Zoning Officer
Lower Providence Township
100 Parklane Drive
Eagleville, PA 19403

Re: Alternate Energy Store, Inc. — Troop Farm

Dear Jeff:

Pursuant to the Order of Judge Louis H. Pollak dated June 15, 1983, an Agreement entered into between Joanne R. Denworth, Esquire, Receiver for Moyer's Landfill, Inc. and Grange Environmental, Inc. and Providence Builders, Inc. was approved by the Court. The Agreement dated May 11, 1983 provides for an acknowledgement by the receiver of the existence of the Option

Letter

Agreement by Alternate Energy Store, Inc. and a Disclaimer by the receiver to all permits.

Accordingly, I would appreciate it if you would issue to Alternate Energy Store, Inc. the zoning permit required by the Commonwealth Court of Pennsylvania by Order dated September 14, 1982.

Thank you for your cooperation.

Very truly yours,

HAMBURG, RUBIN, MULLIN
& MAXWELL

By: J. Edmund Mullin

JEM:ph

CERTIFIED MAIL NO. P284 323 535
RETURN RECEIPT REQUESTED

P.S. I am enclosing a copy of the Agreement and Order.
bcc: Marc D. Jonas, Esq.

OPINION AND ORDER IN *BOARD OF SUPERVISORS V. MOLAND DEVELOPMENT COMPANY*

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

Nos. 522 & 523 C.D. 1974

BOARD OF SUPERVISORS OF UPPER FREDERICK TOWNSHIP,

Appellant

v.

MOLAND DEVELOPMENT COMPANY, INC.,

Appellee

No. 537 C.D. 1974

MOLAND DEVELOPMENT COMPANY, INC.,

Appellant

v.

BOARD OF SUPERVISORS OF UPPER FREDERICK TOWNSHIP

Appellee

BEFORE: HONORABLE JOHN A. MacPHAIL, Judge

HEARD: November 21, 1983

Opinion and Order

MEMORANDUM OPINION AND ORDER
BY JUDGE MacPHAIL FILED November 23 1983

Moland Development Company, Inc. (Moland) petitions this Court to (1) join the Montgomery County Planning Commission (Commission) as an additional respondent in this case and (2) order the Commission and the Board of Supervisors of Upper Frederick Township (Township) to comply with an order of this Court entered May 23, 1975[1] wherein we directed, inter alia, that Moland be permitted to proceed with its plans as submitted to the Township on October 30, 1970, to develop a 412 unit mobile home park, provided Moland would comply with the laws and regulations of the Commonwealth and any other lawful and reasonable laws or ordinances of the Township *then in effect.*[2]

In the intervening years since our Court's order, Moland has attempted to comply with non-zoning requirements, particularly Department of Environmental Resources's regulations. That problem has now apparently been resolved by the entry of a summary judgment in Moland's favor.[3] Earlier this year, Moland presented a petition similar to the one now before the Court which was denied because the case was not ripe for judicial review. Senior Judge Edenharter noted that the Township had not taken any action on any application by Moland.

Pursuant to that order and observation, Moland filed an application for approval of its plan with the Commission which denied it, inter alia, because the Township's new zoning regulations apply. The Commission noted that Moland had not made application for building permits and had not undertaken any type of construction since 1975.

The Township contends that the provisions of Section 508(4) of the Pennsylvania Municipalities Planning Code (Code), Act

of July 31, 1968, P.L. 805, *as amended,* 53 P.S. §10508(4) apply to Moland's present circumstances, i.e., since Moland has not commenced any aspect of the proposed development within five years, its right to do so has expired and the current zoning regulations now apply. We disagree. We are of the opinion that the five year time limitation provided by Section 508 (4) commences when a permit has been *issued.* No permit has been issued here. Our court order was not a permit; it was a direction that a permit *be issued* when Moland had satisfied the conditions stipulated in that order.

While we must agree with Moland that the current zoning regulations do not apply and that Section 508(4) of the Code does not apply, we do not believe we can yet grant the relief Moland seeks from this Court. The Township has not yet refused to grant Moland a permit. It is not, therefore, in defiance of our order. It is true that the Township indicates in the proceeding now before us that it would not grant a permit for reasons which we have herein determined to be invalid and to that extent we now put the Township on notice that it may not refuse to grant Moland a permit for those reasons.

With respect to the Commission, we must agree that it was not subject to our May 23, 1975, order. It is true that the Commission has denied Moland's application for reasons which we have determined herein to be invalid in part. There are, however, other reasons set forth in the Commission's denial of Moland's application which we do not believe are properly before us at this time. There is no appeal permissible from the decision of the Planning Commission to this Court. *See,* Section 1007 of the Code, 53 P.S. §11007.

Regarding that part of the petition now before us which seeks to have the Montgomery County Planning Commission joined

as an additional respondent in this proceeding, we must note that the instant petition is filed to the same docket numbers to which our May 23, 1975 order was entered. Those docket numbers represent appeals from orders of the court of common pleas. There is no provision in the Rules of Appellate Procedure for the joinder of additional parties; therefore, we must refuse to join the Commission.[4]

For the reasons above set forth, we must deny the prayer of the petition with the caveat that if and when Moland complies with the conditions set forth in our order of May 23, 1975, we will expect and insist that our order be respected and enforced.

s/ John A. MacPhail, Judge

FOOTNOTES

1. *Board of Supervisors of Upper Frederick Township v. Moland Development Co.*, 19 Pa. Commonwealth Ct. 207, 339 A.2d 141 (1975).

2. Subsequent to Moland's original application for approval of its plan, the Township re-zoned the area where Moland's Development was proposed and also permitted mobile home parks in another district.

3. *Moland Development Co., Inc. v. Department of Environmental Resources*, (240 C.D. 1982, filed September 9, 1983).

4. Pa. R.A.P. No. 502 cited by Moland as authority for the joinder of the Commission pertains to the substitution of parties, not to the joinder of additional parties.

Office - Supreme Court, U.S.
FILED
APR 11 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1461

In The
Supreme Court of the United States
October Term, 1984

PROVIDENCE BUILDERS, INC., et al.,
Petitioners,

vs.

ZONING HEARING BOARD
OF LOWER PROVIDENCE TOWNSHIP,

LOWER PROVIDENCE TOWNSHIP,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

RICHARD C. SHEEHAN
Counsel of Record for Respondents,
2790 Egypt Road
Audubon, PA 19403
(215) 666-7464

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether the decision of a state appellate court, that its own prior order to a township to issue a zoning permit had in fact, been obeyed by that township by issuing the permit to the real party in interest under state law, should stand because there are no federal or constitutional questions involved, and the decision was correct on the merits?

A. TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF CITATIONS	ii
I. STATEMENT OF JURISDICTION	1
II. STATEMENT OF THE CASE	1
III. REASONS FOR DENYING THE WRIT:	
A. The questions presented were not raised or preserved below.	5
B. Only questions of evidence and factual findings are involved in this case.	8
C. The allegedly conflicting decisions are state court decisions involving state laws, are not applicable to this case, and are completely distinguishable on their facts.	11
D. The court below fully considered and correctly decided the issue.	15
IV. CONCLUSION	25
APPENDIX	App. 1

B. TABLE OF CITATIONS

CASES CITED:

Agins v. City of Tiburon, 447 U.S. 255 (1980)	13
Bowe v. Scott, 133 U.S. 658, 664-65	6
Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	13
Herb v. Pitcairn, 324 U.S. 117, 125-26	12
Live Oak Ass'n v. Railroad Commission, 296 U.S. 354, 357-58	7

TABLE OF CITATIONS—Continued

Page

Lynch v. New York ex rel Pierson, 293 U.S. 62, 54 7

Moyer's Landfill, Inc. v. Zoning Hearing Bd. of Lower Providence Township, 69 Pa. Commonwealth Ct. 47, 450A.2d 273 (1982) 10, 20

O'Leary v. Moyer's Landfill, Inc., Civil No. 80-3849 (D.Pa.) 2

Oxley Stave Co. v. Butler County, 166 U.S. 648, 655 6

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) 13

Pennsylvania Turnpike Commission v. Evans, 13 Pa. D&C2d 290, 298-99 (1958) 16

Raum v. Board of Supervisors of Tredyffrin Tp., 27 Pa. Commonwealth Ct. 9,370 A.2d 777 (1977) 10, 22, 25

San Diego Gas and Electric Co. v. City of San Diego, 450 U.S. 621 (1981) 13

White River Lumber Co. v. Arkansas ex rel. Applegate, 279 U.S. 692, 700 6

Whitney v. California, 274 U.S. 357, 362-63 6

STATUTES CITED:

Act of July 9, 1976, P.L. 586, sec. 2, 42 Pa. C.S.A. sec. 562 10

Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, as amended, 53 P.S. Section 10101 et seq. 12

TABLE OF CITATIONS—Continued

Pages

RULES CITED:

Rule XV, Internal Operating Procedure of the Commonwealth Court of Pennsylvania 9

Pennsylvania Rule of Appellate Procedure 2591(b) 10, 22

OTHER AUTHORITIES CITED:

Robert Ryan, *Pennsylvania Zoning Law and Practice*, Sec. 9.4.30 (March 31, 1981) 21

C. APPENDIX

Memorandum Opinion and Order of the Commonwealth Court of Pennsylvania filed December 19, 1983 ..... App. 1

I. STATEMENT OF JURISDICTION

Jurisdiction is not conferred upon this Court by 28 U.S.C. section 2101(c) because there are no constitutional claims, federal questions, or federal statutes presented for review.

II. STATEMENT OF THE CASE

This case began with the filing by petitioners of a petition seeking substitution of parties and enforcement of a prior court order with the Commonwealth Court of Pennsylvania, the intermediate appellate court of that state. The Commonwealth Court denied the petition, *finding* as a matter of fact, that the prior order had been fully complied with by the Township. After a subsequent denial of their petition for reconsideration by the Commonwealth Court, petitioners filed a petition for allowance of appeal to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court granted the petition for allowance of appeal. After briefing and oral argument, the Pennsylvania Supreme Court, without opinion, dismissed the appeal as having been improvidently granted. Thereupon, petitioners filed a writ of certiorari with this Honorable Court.

The undisputed facts in this case are as follows:

(1) In 1977, Moyer's Landfill, Inc., a Pennsylvania corporation, filed a zoning appeal seeking permission to use a tract of ground known as the Troop Farm in Lower Providence Township as a landfill.

(2) On September 14, 1982, the Commonwealth Court reversed the lower court's denial of that appeal and ordered the zoning authorities of Lower Providence Township to issue the zoning permit (R.2a).

(3) In July, 1982, Moyer's Landfill, Inc. was placed in Receivership by the order of federal court, the Honorable Louis J. Pollack, in the matter of *O'Leary v. Moyer's Landfill, Inc.*, Civil No. 80-3849 (D.Pa.) (R.26a). (This action placed Moyer's Landfill, Inc. under the supervision of a court-appointed Receiver. Petitioners alleged this fact in paragraph 5 of their petition for substitution of parties and enforcement of order (R.56a) and it was admitted by the respondent in paragraph 5 of its answer thereto (R.71a)).

(4) On September 29, 1982, Joanne Denworth, Esquire, the federal Receiver for Moyer's Landfill, Inc., wrote a letter addressed to the Township Zoning Officer, Chairman of the Township Zoning Hearing Board, Chairman of the Township Board of Supervisors and the Township Manager, advising of her appointment as Receiver for Moyer's Landfill, Inc., that she had received the Commonwealth Court's opinion and order in the instant case, and requesting that the Township issue the permit to Moyer's Landfill, Inc. and forward it directly to her at the address provided (R.77a). A copy of that letter was sent by the Receiver to Howard and Catherine Moyer and Stephen H. Lupin, Esquire, *inter alia*.

(5) Stephen H. Lupin, Esquire, was counsel of record for Moyer's Landfill, Inc. in the Commonwealth Court in the instant case. He was an employee of the law firm of

Hamburg, Rubin, Mullin & Maxwell. J. Edmund Mullin, Esquire, is a partner in that firm. Mr. Mullin was, and is, counsel for Providence Builders, Inc. and Alternate Energy Store, Inc. as well as becoming the sole owner of Alternate Energy Store, Inc. (R.297a).

(6) The testimony established that neither petitioner, independently or through their attorneys, ever raised any objection with the Township regarding the Receiver's demand for the permit. Nor was any objection ever raised in the Federal Court.

(7) In January, 1983, the Township issued to Moyer's Landfill, Inc. the permit, as requested by Moyer's Landfill, Inc., for the use of the Troop Farm as a landfill.

(8) During the entire period from the Commonwealth Court's order on September 14, 1982, until July 15, 1983, no person or entity other than Moyer's Landfill, Inc. applied to or requested that the Township issue the permit ordered by the Commonwealth Court.

(9) The testimony of Providence Builders, Inc.'s President and sole owner was that he knew of the permit having been issued and a copy having been obtained by Howard Moyer (R.187a). Alternate Energy Store, Inc.'s President, who was also attorney for Providence Builders, Inc., testified he had been negotiating with the Receiver concerning the permit (R.143a).

(10) Neither petitioner ever filed an appeal from the issuance of said permit nor did anyone complain to the Township about its issuance.

(11) In December, 1982, after the Commonwealth Court's order, but before the Township issued the permit

to Moyer's Landfill, Inc., the Township enacted a zoning ordinance which rezoned a large section of the center of the Township R-1 Residential.

(12) Despite that rezoning, the Township, in January, 1983, issued the permit ordered by the Commonwealth Court.

(13) That rezoning was not used as a basis for a refusal to issue the permit to Moyer's Landfill, Inc.

(14) On March 18, 1983, Moyer's Landfill, Inc. returned the permit to the Township with a letter stating that there was no intention to make use of the permit (R. 296a).

(15) On July 15, 1983, Alternate Energy Store, Inc., for the first time, requested that the permit ordered by the Commonwealth Court on September 14, 1982, be issued to it (R.297a).

(16) That request was based upon an Agreement dated May 11, 1983, entered into between the Receiver for Moyer's Landfill, Inc. and Grange Environmental Corporation and Providence Builders, Inc., wherein the Receiver consented to an Option Agreement by Alternate Energy Store, Inc. and stated that Moyer's Landfill, Inc. disclaimed any interest in all permits. Copies of the Agreements were attached to Mr. Mullin's letter (R.298a).

(17) The Township advised Alternate Energy Store, Inc. that the permit requested had already been issued and the Commonwealth Court order complied with (R.69a).

(18) On September 28, 1983, petitioners Alternate Energy Store, Inc. and Providence Builders, Inc. filed a

petition for substitution of parties and enforcement of the prior order with the Commonwealth Court (R.55a).

(19) No question concerning the authority of the Receiver to apply for and obtain the permit ordered by the Commonwealth Court was ever raised in that petition (R.55a).

(20) On December 19, 1983, the Commonwealth Court, after argument and briefing, denied the petition for enforcement of court order and for substitution of parties (R.196a).

(21) On February 3, 1984, the Commonwealth Court denied the petition of Alternate Energy Store, Inc. and Providence Builders, Inc. for reconsideration, reargument and allowance to present additional evidence (R.329a).

(22) On June 5, 1984, appellants' petition for allowance of appeal was granted by the Supreme Court of Pennsylvania. After briefing and oral argument, the Pennsylvania Supreme Court dismissed the appeal as having been improvidently granted.

No federal question or constitutional issue was ever raised by the petitioners in the state courts. On the contrary, the case presents only evidentiary questions and factual findings unique to the petitioners.

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III. REASONS FOR DENYING THE WRIT

A. The Questions Presented Were Not Raised Or Preserved Below.

For the first time in the history of this case, petitioners, in their writ of certiorari, alleged that the Fifth

Amendment due process clause and the Fourteenth Amendment due process clause have been violated. It is well-settled that a federal question cannot be raised for the first time in the writ of certiorari to this Court. *White River Lumber Co. v. Arkansas ex rel. Applegate,* 279 U.S. 692, 700; *Whitney v. California,* 274 U.S. 357, 362-63. Yet, this is precisely what petitioners do.

In the Commonwealth Court, the petitioners did not raise any violation of the Fifth Amendment or Fourteenth Amendment in their Petition for Substitution of Parties and Enforcement of Court Order (R.55a). The Commonwealth Court denied this petition, based on state grounds and the resolution of factual questions. In their Petition for Rehearing by the Commonwealth Court, *en banc,* petitioners make a vague reference to due process (R.207a). Certainly, this general language does not rise to meet the requirements of particularity in raising a federal question, as stated by this Honorable Court in *Oxley Stave Co. v. Butler County,* 166 U.S. 648, 655:

> the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right.

This Honorable Court in the past has held that a mere reference to "due process of law" is insufficient to invoke its jurisdiction. *Bowe v. Scott,* 233 U.S. 658, 664-65.

Struggle though they may, petitioners are unable to point to the raising of these questions in the state courts. In the Statement of the Case contained in their Writ of Certiorari (p. 7), petitioners attempt to convince this Court

that the federal questions indeed were raised and preserved below:

> The constitutional issue of exclusionary zoning was at the heart of the original challenge from its inception. *See The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge,* 81 Yale L. J. 61, 65-66 (1971). The federal constitutional due process issue was raised in the *briefs* submitted to the Commonwealth and Supreme Courts of Pennsylvania. . . .

(Emphasis added).

It is well-settled that briefs and oral arguments before state courts are not part of any record filed with the Supreme Court and cannot be used to establish that a federal question was raised. *Live Oak Association v. Railroad Commission,* 296 U.S. 354, 357-58; *Lynch v. New York ex. rel Pierson,* 293 U.S. 62, 54. Petitioners then argue that constitutional issues were at the heart of the original challenge by Moyer's Landfill, Inc. to the zoning ordinance of Lower Providence Township. This is undisputed. It is also true that Moyer's Landfill, Inc. won that case when the Commonwealth Court declared the zoning ordinance unconstitutional. Lower Providence Township does not dispute that holding. That constitutional issue has been fully resolved, and any resurrection of it before this Honorable Court is clearly not justiciable.

Petitioners are attempting to cloud the waters by lumping the instant appeal together with the already-decided challenge to the constitutionality of the zoning ordinance, embodied in the September 14, 1982 order of the Commonwealth Court. If petitioners are raising a question as to that decision with this Honorable Court, their dead-

line has long since passed. The order of the Commonwealth Court of December 19, 1983 is the proposed subject of review by this Court. (*See* Statement of Jurisdiction of the Writ of Certiorari, p. 2.)

The Commonwealth Court order of December 19, 1983 denied the Petition for Substitution of Parties and Enforcement of Court Order. No constitutional grounds or federal questions were raised by the petitioners before that Court. Therefore, there is no jurisdiction of this Honorable Court to review the decision of the Common-Wealth Court of Pennsylvania dated December 19, 1983. The Writ of Certiorari must be denied.

B. Only Questions Of Evidence And Factual Findings Are Involved In This Case.

Regardless of whether a federal question was *raised* below, it is obvious that this case has not involved constitutional or federal questions. On the contrary, only questions of evidence and factual findings are at issue.

The central issue presented by the petitioners to the Commonwealth Court was whether the Township of Lower Providence had violated a prior Commonwealth Court order dated September 14, 1982. That order had required the Township to issue a permit to operate a sanitary landfill to Moyer's Landfill, Inc. When presented with the allegation that its prior order had been violated by the Township, the Commonwealth Court held two evidentiary hearings and received briefs and oral argument. The Commonwealth Court found as a matter of fact that the Township had fully complied with the 1982 order, by issuing the permit to Moyer's Landfill, Inc.; that the receiver

in charge of Moyer's Landfill, Inc. was the real party in interest entitled to receive the permit; and finally, that the permit had been abandoned by the permittee, Moyer's Landfill, Inc.

The Commonwealth Court's conclusions of fact and law are not federal or constitutional questions such as would trigger the exercise of the jurisdiction of this Court. On the contrary, the facts of this case are so unique that it is difficult to see how its holding could be used in a future case. The body of Pennsylvania law was properly applied by the court and this application is so inexorably entwined with the peculiar circumstances of this case as to preclude review by this Court. The Commonwealth Court recognized the unique factual circumstances, for it designated the opinion of Judge MacPhail "not reported." (R.196a). Petitioners assert that the decision of the court, declining to hold the Township in contempt, will have great precedential value. As previously discussed, the opinion of the Commonwealth Court dated December 19, 1983, is "not reported." By Pennsylvania Rule of Court, opinions and orders which are not reported have no precedential value:

> The [Commonwealth] Court may file memorandum opinions and orders which are not reported. *An unreported opinion of this Court may not be cited as precedent or for any other purpose in any brief, argument or subsequent opinion.* The fact of nonreporting shall be noted on the Court docket and on the face sheet of the opinion....

Rule XV, Internal Operating Procedure of the Commonwealth Court of Pennsylvania. [Emphasis added].

Under Pennsylvania law, an appellate court has the power to enforce its own orders. *See* Act of July 9, 1976, P.L. 586, sec. 2, 42 Pa. C.S.A. sec. 562; Pennsylvania Rule of Appellate Procedure No. 2591(b); *Raum v. Board of Supervisors of Tredyffrin Township,* 29 Pa. Commonwealth Court 9, 370 A. 2d 777 (1977). The failure of a party to obey an order of the Commonwealth Court is a direct affront to that court, punishable by contempt of court or other appropriate order. Petitioners sought to convince the court that the Township had refused to comply with the Commonwealth Court order (Petition for Substitution of Parties and for Enforcement of Order, paragraph 10, R.58a). In this effort, they failed because the Township had, in fact, complied with the Commonwealth Court order. No earth-shaking precedent or changes of law were made by the Commonwealth Court's decision. On the contrary, the opinion clearly affirms past decisions and reinforces the concept that the appellate court can enforce a prior order. In this case, no enforcement was necessary because the order had been fully complied with by the Township.

The Commonwealth Court rendered the initial decision in *Moyer's Landfill, Inc. v. Zoning Hearing Board of Lower Providence Township,* 69 Pa. Commonwealth Ct. 47, 450 A.2d 273 (1982). It drafted the order which compelled the Township to issue the permit to Moyer's Landfill, Inc. The integrity of its judgment and its order was at stake if th Township disobeyed that order.

The Commonwealth Court, after receipt of the petition for enforcement of the order and answer thereto, held an evidentiary hearing to determine whether the Town-

ship had complied with its order of September 14, 1982. Witnesses for both sides were called, testified, and were cross-examined. In due course, the Court issued its opinion finding that the Township had complied with the order of September 14, 1982 by issuing the zoning permit to Moyer's Landfill, Inc. After careful consideration of the petitioners' petition for rehearing, the Commonwealth Court *en banc* affirmed the decision that the integrity of the Commonwealth Court had not been compromised. Surely the Commonwealth Court is the best judge of when its own order has been obeyed. The Supreme Court of Pennsylvania certainly agreed, for it dismissed the appeal. There is simply no issue of federal or constitutional law involved here. Neither is there an issue of state law. The sole question was one of fact.

C. The Allegedly Conflicting Decisions Are State Court Decisions Involving State Laws, Are Not Applicable To This Case, And Are Completely Distinguishable On Their Facts.

Petitioners, in an effort worthy of Procrustes, attempt to fit this case into a constitutional framework by alleging that the Commonwealth Court decision conflicts with state and federal court decisions on zoning. All of these cases are inappropriately cited and completely distinguishable on their facts.

The question of whether an appellate court's prior order has been obeyed is certainly a question of state law applied to the particular facts of each case. The question of whether a permit has been abandoned is also a question of state law applied to the particular facts of each case. In an attempt to argue that the Commonwealth

Court was in error, petitioners raise again the same arguments which they raised before the Commonwealth Court *en banc* and the Pennsylvania Supreme Court. These arguments focus on general principles of the Pennsylvania law of zoning, the Pennsylvania Municipalities Planning Code (Act of July 31, 1968, P.L. 805, as amended, 53 P.S. sec. 10101 et seq.), and past Pennsylvania court decisions. Not a single one of these arguments raises a federal or constitutional issue. Any review of the Commonwealth Court's decision applying principles of state law is exclusively within the jurisdiction of the Pennsylvania Supreme Court. That court, after briefing and oral argument, dismissed the appeal as being improvidently granted, apparently recognizing that the Commonwealth Court was the best judge of whether its own order had been violated.

This Honorable Court has no jurisdiction to review a state court order based upon state grounds. As the Court stated in *Herb v. Pitcairn,* 324 U.S. 117, 125-26:

> The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

The Commonwealth Court did not incorrectly adjudge federal rights, for no federal rights are at issue here. Therefore, this Honorable Court has no jurisdiction to review the state court's decision.

In a flimsy effort to take this case out of the Pennsylvania state law area, petitioners cite several decisions of this Court. Apparently, petitioners feel that it is suffi-

cient to scatter a handful of Supreme Court cases throughout a writ of certiorari in order to invoke this Court's jurisdiction, for none of the cases cited has any relevance to the instant case. Petitioners cite *San Diego Gas and Electric Co. v. City of San Diego,* 450 U.S. 621 (1981), an inverse condemnation case wherein the Court denied certiorari for lack of jurisdiction. They then cite *Agins v. City of Tiburon,* 447 U.S. 255 (1980) and *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922), involving inverse condemnation, for the general principle that municipal zoning regulations could constitute a taking. Even the venerable case of *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) is dredged up by petitioners in their search for federal citations.

The seeding of the writ of certiorari with past Supreme Court decisions cannot help the petitioners find a federal question. Petitioners use innuendo and hint at complicity between the Receiver and the Township to squeeze this case into the "protective umbrella" of the Fifth and Fourteenth Amendments. Fortunately, innuendo cannot create a federal question.

In a final effort to create a viable federal issue out of the facts of this case, the petitioners argue that this Court's review is warranted because there is an apparent conflict in the types of relief afforded by other state courts in municipal ordinance challenges. Apparently, the petitioners want this Court to correct the state courts' determination of the remedies that will be given to successful litigants.

There are several problems with petitioners' argument. The most obvious is that the state courts' deter-

mination of the relief afforded to litigants is a question of state law. The fact that two states may have conflicting decisions is not a federal issue to be resolved by this Court. Petitioners are arguing for conformity among decisions of the highest state courts on the same subjects. They want this Court to require all state courts to reach the same decision. Such a result is a direct affront to the separation of powers between the state and federal courts, and is anathema to the Constitution.

Secondly, the petitioners are arguing that the Commonwealth Court, by ordering the Township to issue the permit to Moyer's Landfill, Inc., did not provide the appropriate relief. Rather, say the petitioners, the court should have ordered a rezoning of the property of the successful litigant. Regardless of the fact that Moyer's Landfill, Inc. never requested court-ordered rezoning as a remedy in the original litigation, it is nevertheless too late for petitioners to challenge the relief ordered on September 14, 1982, in this Court. Once again, the petitioners blur the procedural history of this case. They are arguing now that the Commonwealth Court order of 1982 was not the right remedy. Yet no challenge was made to that order by the petitioners. They certainly cannot collaterally attack it now in this proceeding.

There are no federal grounds which would require this Court's review in this case. The facts of this case are unique. The Commonwealth Court decision is based upon its resolution of the factual issues under Pennsylvania law. The writ of certiorari is, therefore, without merit and must be denied.

D. The Court Below Fully Considered And Correctly Decided The Issues.

An analysis of the Commonwealth Court opinion yields two issues which were decided by the court: (1) Whether Moyer's Landfill, Inc., by the Receiver, was the real party in interest entitled to receive the permit; and (2) whether Moyer's Landfill, Inc., abandoned the permit by returning it to the Township with the stated intention not to use it.

The Commonwealth Court found that the Receiver for Moyer's Landfill, Inc. was the only real party in interest at the time she requested the permit. Furthermore, the Township complied with the order of September 14, 1982 by issuing the permit to Moyer's Landfill, Inc.

The Commonwealth Court looked to the applicable law and the particular facts of this case to determine whether the Receiver was the real party in interest in this case.

By order of the Honorable Louis J. Pollock of the Federal District Court for the Eastern District of Pennsylvania dated July 16, 1982, Joanne Denworth was appointed the Receiver for Moyer's Landfill, Inc. The order specifically provided that:

> The Receiver shall immediately take possession of all assets of Defendants Moyer's Landfill, Inc. . . . and shall have the authority to manage, sell, discharge, dispose of, lease, encumber and quiet title to such assets, for the purpose of implementing the Consent Decree.

Certainly, a permit ordered by the Commonwealth Court to be issued to Moyer's Landfill, Inc. qualifies as

an asset of Moyer's Landfill, Inc. And yet, petitioners argued that the Receiver had "questionable authority" to request the permit from Lower Providence Township.

The law on the authority of a Receiver to act on behalf of the entity whose property is in receivership is clear.

> The Receiver stands in the shoes of the corporation or person whose property is in receivership with exactly the same rights and obligations, with respect to such property, that such person had at the inception of the receivership . . .

Pennsylvania Turnpike Commission v. Evans, 13 Pa. D & C 2d 290, 298-99 (1958).

Absent any evidence to the contrary, the Receiver stepped into the shoes of Moyer's Landfill, Inc. In the instant situation, the "shoes" are the right of Moyer's Landfill, Inc. to the permit ordered by the Commonwealth Court.

In the petition for substitution of parties and enforcement of court order dated September 14, 1982, petitioners averred that an agreement dated May 11, 1983 established that the appellants were entitled to the permit as successors in interest to Moyer's Landfill, Inc. The petitioners averred that the entity known as Moyer's Landfill, Inc. was operating under the supervision of a court-appointed Receiver (which fact was admitted by the Township, and must be accepted as true). No mention was made in this petition of agreements pre-dating the Receivership.

It is obvious that the petitioners were relying on the agreement of May 11, 1983 to assert a claim to the permit. The Commonwealth Court considered this argument and reviewed the May 11, 1983 agreement. The court said:

> Here, Petitioners confront us with an agreement dated May 11, 1983 by the terms of which the receiver acknowledges that AES has taken by assignment the rights of Moyer's under Moyer's agreement with P.B., and by the terms of which the receiver *disclaims* any interest in permits for the landfill in subject tract. ***In our judgment, the receiver was giving up permit rights she no longer had and her recognition of AES as the real party in interest as of May 11, 1983 is after the fact.***

(Emphasis added).

There can be no dispute that an agreement of May 11, 1983 which the petitioners claimed assigned them Moyer's right to a permit has no effect on the rights of the parties previous to that date. (This claim of the assignment of Moyer's right to the permit is clearly open to debate, in and of itself). Therefore, the agreement of May 11, 1983 has absolutely no relevance to the rights of Moyer's Landfill, Inc. to request the permit and the duty of Lower Providence Township to issue it to Moyer's Landfill, Inc.

The May 11, 1983 agreement is, however, highly relevant and informative in another regard. Obviously, the petitioners at the time considered the Receiver to be the real party in interest to request and receive the permit. After the permit was requested by the Receiver, the petitioners entered into "negotiations" with the Receiver to obtain the right to the permit. The culmination of these negotiations resulted in the Receiver agreeing to disclaim any interest in the permit and the petitioners agreeing to subordinate liens on the property. It would appear that the petitioners gave up some right regarding these liens in order to obtain a disclaimer from a Receiver who supposedly had "questionable authority" to request the permit. This course of conduct and pleadings indicate that the

petitioners believed that the Receiver was the real party in interest entitled to the permit.

Furthermore, the petition for substitution of parties asserts that the May 11, 1983 agreement with the Receiver is the basis for substituting petitioners as the real party in interest entitled to the permit. Clearly, the petitioners cannot now argue that the Receiver did not, in fact, have the authority to request the permit from the Township.

Failing to establish that the May 11, 1983 agreement is a basis for finding that the Township violated the September 1982 agreement, the petitioners introduced additional documents at the evidentiary hearing. An installment sales agreement and two (2) option agreements executed February 27, 1981 were introduced to support the petitioners' claim that they were the real parties in interest. The Commonwealth Court reviewed the testimony and the agreements. The Court concluded:

> Although there was an installment sales agreement and two (2) option agreements executed February 27, 1981 by the terms of which AES now asserts that it has succeeded to the rights of Moyer's, there is nothing in the chronological statement of events or in the evidence presented at the hearing we held on the instant petitions, which would indicate when AES *exercised* its rights under the option agreements.[5] The installment sales agreement between AES and PB for the subject tract is dated February 28, 1983. *We conclude, therefore, that on September 29, 1982, when the receiver requested that the special exception permit be issued, she, as receiver, and no one else, was the real party in interest entitled to that permit.*
>
> fn. 5. Both option agreements provided that the option should be exercised by AES giving written

> notice to the optioners (Moyer's and P.B. of their intention to exercise the option.)

(R.202a; Emphasis added)

The Receiver stood in the shoes of Moyer's Landfill, Inc. Moyer's Landfill, Inc. was entitled to the permit ordered by the Court as the real party in interest, in September of 1982 when the permit was requested, and in January of 1983 when the permit was received, and in March of 1983 when the permit was abandoned. The Commonwealth Court's finding is well-supported by the evidence. Petitioners, who had the burden of proving that they were the real parties in interest, failed to establish that fact. On the contrary, their original Petition for Substitution of Parties, by relying on the May 1, 1983 agreement as the basis for their claim to be substituted, supports the Court's conclusion that the Receiver was the real party in interest at all relevant times. The *very existence* of the May 11, 1983 agreement proves that the petitioners considered the Receiver to be the real party in interest. The installment sales and option agreements of February 28, 1981 do not establish the rights of the appellants to the permit. The petitioners did not establish when or if the option was properly exercised. The opinion of the Commonwealth Court is solidly grounded in law and fact. The Receiver for Moyer's Landfill, Inc. was the only real party in interest entitled to the zoning permit.

The Receiver stands in the shoes of Moyer's Landfill, Inc. Moyer's Landfill certainly had the right to use the permit to develop the Troop Farm as a sanitary landfill. That was the result of years of litigation culminating in

Moyer's Landfill, Inc. v. Zoning Hearing Board of Lower Providence Township, 69 Pa. Commonwealth Ct. 47, 450 A.2d 273 (1982). Moyer's Landfill, Inc. was, at all relevant times, from the time the permit was issued until it was returned, free to use that parcel as a landfill, and there would be nothing that the Township or anyone else could do to stop it.

However, it must also be remembered that Moyer's Landfill, Inc. could decide not to so use that land. It could decide to abandon its intention to operate a landfill on the site and return the permit to the Township. The Commonwealth Court did not have the right to deny Moyer's that option. The petitioners do not have the option to deny Moyer's that right. Certainly, the Township did not have the right to deny Moyer's that option.

Petitioners argue that the right to a special exception runs with the land, and not the particular person who owns the land. This is true. However, petitioners misunderstand what is meant by the right to a special exception running with the land. The Commonwealth Court articulated very carefully what the right to a special exception means:

> It must be observed, of course, that a zoning permit for land use pertains to the tract of land itself. If land has been approved for a specific use, it matters not in whose name the permit is issued, Ryan, *Pennsylvania Zoning Law and Practice* sec. 9.14.18 (1981), and under normal circumstances, any person having a proprietary interest in the subject land, could claim the permit or exercise the rights granted to the named permittee. *If AES was the successor in interest to Moyer's, therefore, the mere fact that it was not the named applicant or permittee would not in and of itself bar its right to claim the permit.* (R.200a, emphasis supplied).

But, as already discussed, AES was not the successor in interest to Moyer's at the time the permit was abandoned by Moyer's, if it ever did become Moyer's successor in interest. A successor stands in the shoes of his predecessor. Moyer's could not give what it no longer possessed.

Petitioners misapprehend that the right of a special exception runs with the land, for it is clear that they do not see that a special exception does not have to exist for time immemorial. It is well-settled in Pennsylvania law that special exceptions may expire or be abandoned. Robert Ryan, *Pennsylvania Zoning Law and Practice*, sec. 9.4.30 (March 31, 1981). Contrary to appellants' assertion that there is a magical number of days which constitutes an abandonment (in their opinion, it's more than fifty), abandonment may be evidenced by intent to abandon and the act of abandonment. Certainly, it could not be clearer in the instant case. Moyer's Landfill, Inc. returned the permit to the Township stating that it did not intend to make use of it. Thus, abandonment was proved.

Furthermore, the Commonwealth Court articulated the existing law on the termination of a special exception:

> Since the permit clearly spelled out that unless building commenced within six (6) months the permit would expire, all of Moyer's rights and those who succeeded in interest thereto terminated at the end of six (6) months from the date of issuance.

The court found, as a matter of fact, that Moyer's Landfill, Inc. had abandoned its right to the permit. Subsequently, when petitioners requested the permit from the Township, the permit had long since been terminated.

The petitioners attempted to argue that the Township had acted in bad faith when it issued the permit to the

Receiver. The Commonwealth Court flatly rejected this argument, finding that appellants' allegations were not grounded in the evidence and could not support a finding of bad faith. The court stated:

> . . . we see no evidence that the Township did anything other than what our order permitted and directed it to do. Hints of complicity between the Township and the Receiver are insufficient for us to impose sanctions in the within matter. (R.204a).

As the Commonwealth Court adopted in *Raum v. Board of Supervisors of Tredyffrin Township*, 29 Pa. Commonwealth Ct. 9, 370 A.2d 777, 782 (1977), there must be a standard of showing bad faith in a Pennsylvania Rule of Appellate Procedure 2591(b) proceeding. The petitioners argued that the Township acted suspiciously (1) by issuing the permit to the Receiver; (2) by the subsequent return of the permit by the Receiver with the intention not to use it; and (3) by the rezoning of the district wherein the Troop Farm is related.

First of all, the Township's action in issuing the permit to the Receiver is beyond reproach. Petitioners assert that the Township's failure to give them notice of the issuance of the permit and the return of the permit shows bad faith on the part of the Township to defeat Landowner's right to the zoning permit and the landfill use approved by the Commonwealth Court. This argument is ludicrous. The Receiver for Moyer's Landfill, Inc. was the only real party in interest entitled to the permit. The Township, in issuing a zoning permit, is not required to notify third parties not involved in the transaction. No one, including petitioners, put the Town-

ship on notice that there was a dispute over the issuance of the permit to Moyer's Landfill, Inc.

Petitioners assert that the Township was on notice of their interest and should have notified them of the issuance and return of the permit. Leaving aside for the moment the fact that petitioners had actual notice of the issuance of the permit, the petitioners argue that the Township had the duty to independently evaluate the interests of Petitioners which may have been raised in an unrelated matter, determine if they are the real parties in interest and notify them of the issuance of the permit to another party. Even if this impossible standard were imposed on the Township in this case, the fact remains that the Receiver for Moyer's Landfill, Inc. was the real party in interest. The Township had no duty or reason to correspond with petitioners regarding the permit.

Secondly, petitioners contend that the action of the Receiver in returning the permit evidences the bad faith of the Township. Surely, even if, assuming arguendo, that the Receiver did act in bad faith, such motives could not be imputed to the Township. The petitioners further assert that there was a lack of good faith and fairness because the Receiver, despite alleged negotiations with the petitioners requested and received the permit. Again, the Commonwealth Court was asked to impute allegedly bad faith motives of a third party to the Township. Surely, to do so would indeed be manifest unfairness.

Although the question of the Receiver's alleged bad faith, even if proved, is irrelevant and has no bearing on the alleged bad faith of the Township, it must be pointed out that the petitioners did not prove any bad faith on

the part of the Receiver. The burden of proving bad faith is on the petitioners. There is no doubt that they failed to carry that burden.

Finally, petitioners urge that the Township engaged in "retributive zoning" of the district wherein the Troop Farm is located. The use of the pejorative "retributive zoning" is just not applicable to the rezoning in this case. The facts in this case simply do not support a retributive zoning argument. The Township rezoned this property along with a large portion of other properties to R-1 Residential in December, 1982. That was the culmination of years of work and study. The Montgomery County Planning Commission had been recommending such a rezoning over a period of many years. (R.302a). *After* that rezoning had taken place in December, 1982, the Supreme Court of Pa. denied Township's Petition for Allowance of Appeal in the instant case. Thereafter, in *January, 1983,* the Township, in total disregard of the rezoning, issued a permit to Moyer's Landfill, Inc. for the use of the property as a landfill! How can that rezoning be called retributive? Moyer's was at all times, from the time that permit was issued, free to use that parcel as a landfill. Had Moyer determined to operate a landfill on that site, that is exactly what would be there now and there was nothing that the Township could do to stop it. Once that permit was provided to Moyer's in spite of the changed zoning, that change in the zoning becomes meaningless and retributive zoning cases and arguments are totally irrelevant. Petitioners confuse the actions of Moyer's in abandoning the permit with the action of the Township in rezoning the property. The Township is not responsible for the action of Moyer's Landfill, Inc.

There is nothing compelling about petitioners' retributive zoning arguments. Obviously, for these reasons, the instant case is easily distinguishable from *Raum v. Board of Supervisors*, 29 Pa. Commonwealth Ct. 9, 370 A.2d 777 (1977). Unlike *Raum, supra,* the Township in this case did not attempt to thwart the order of September 14, 1982 by unwarranted delays, retributive rezoning, unreasonable fee schedules and other dilatory tactics. *The Township issued the permit.*

IV. CONCLUSION

The essentially factual nature of this case, the absence of any federal or constitutional grounds, and the failure of petitioners to raise and preserve a federal question compel the denial of the petition for writ of certiorari. There is no conflict created by the Commonwealth Court decision with any federal case, Pennsylvania case or other state case. On the contrary, the lower court decision follows the principles of Pennsylvania law on zoning, property law and real party in interest principles. There are no compelling federal questions or violations of the Fifth and Fourteenth Amendments.

By order of September 14, 1982, the Commonwealth Court directed the Township to issue a permit to Moyer's Landfill, Inc. The Township obeyed. Moyer's Landfill, Inc. subsequently abandoned the permit. The petitioners, who assert rights based on a post-abandonment agreement, are strangers to the transaction. Their business enterprises may not have met their expectations, but

their Fifth and Fourteenth Amendment rights have not been violated by the Township.

There is no federal statute involved in this case. There is no conflict with other federal or state decisions involving constitutional rights. Petitioners have had their day in court, and they lost. There are no grounds whatsoever for the exercise of the jurisdiction of this Honorable Court.

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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OPINION OF THE
HONORABLE JOHN A. MacPHAIL

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

NO. 1741 C.D. 1981

MOYER'S LANDFILL, INC.,

Appellant

v.

ZONING HEARING BOARD OF LOWER
PROVIDENCE TOWNSHIP,

Appellee

BEFORE:
HONORABLE JOHN A. MacPHAIL, Judge

HEARD: November 21, 1983

OPINION NOT REPORTED

MEMORANDUM OPINION

BY JUDGE MacPHAIL Filed December 19, 1983

On September 14, 1982, this Court entered an order in *Moyer's Landfill, Inc. v. Zoning Hearing Board of Lower Providence Township*, 69 Pa. Commonwealth Ct. 47, 450 A.2d 273 (1982)[1] directing the zoning authorities of Lower Providence Township (Township) to issue a permit to Moyer's Landfill, Inc. (Moyer's) for the operation of a sanitary landfill on a tract of land containing 131 acres adjoining another tract of 47 acres upon which Moyer's had been conducting a landfill since 1974.[2] The subject tract is located in what was, at the time the

zoning proceedings were commenced, an I-Industrial zoning district. By an amendment to its zoning ordinance in 1977, the Township provided that sanitary landfills would be permitted uses in the I-Industrial district as a special exception. This amendment occurred after Moyer's had filed a constitutional challenge to the zoning ordinance on the basis that it excluded the legitimate use of land for the operation of a sanitary landfill. On December 13, 1982, the Township again amended its zoning ordinance by rezoning the area in which the subject tract is located as an R-1 Residential district. A sanitary landfill is not a permitted use in R-1 districts.

The matters now before us consist of: (1) the petition of Providence Builders, Inc. (PB) and Alternate Energy Store, Inc. (AES) for (a) an order of this Court to enforce its prior order of September 14, 1982 by directing the zoning authorities of the Township to issue a permit for the sanitary landfill to them and (b) permitting them[3] to be substituted as parties in the within action and (2) the motion of the Township to dismiss the petition of PB and AES because they are not proper parties before this Court.

It must be explained that the tract of land which was the subject of our order of September 14, 1982 was owned at all pertinent times by PB and, according to testimony we received, is still owned by that corporation. Since our order of September 14, 1982, it appears that Moyer's has defaulted on its real estate installment sale agreement with PB. AES avers that pursuant to an option agreement with Moyer's, it has taken by assignment Moy-

er's rights as the purchaser of the subject tract under the real estate installment sale agreement. Because AES now stands in the shoes of Moyer's, it contends that it may be substituted as the real party in interest in the action which was adjudicated in 1982, and is entitled to have the zoning permit in question issued to it. AES, indeed, applied for that permit to the Township. The zoning officer refused to approve the application asserting that (1) the permit had already been issued and returned to the Township and (2) the tract has been rezoned R-1, a classification which would not permit a sanitary landfill at the time AES submitted its application.

The Township presented evidence that when a receiver was appointed for Moyer's in proceedings in federal court, that receiver applied for and was granted a special exception permit by the Township to permit a landfill on the subject tract. On March 18, 1983, that permit was returned by the receiver to the Township. It is the Township's position that they have complied with our order of September 14, 1982 by issuing that permit and that no permit for a sanitary landfill may now be issued for the tract which, as we have noted, has since been rezoned.

Some of the lesser issues in this case have been resolved by a prior decision of this Court. In *Raum v. Tredyffrin Township Board of Supervisors,* 29 Pa. Commonwealth Ct. 9, 370 A.2d 777 (1977) we held, *inter alia,* that (1) this Court has the inherent power to issue an appropriate order in aid of our judgment where one of the parties refuses to abide by a decision of the Court and (2) where we have ordered that a petitioner be permitted to proceed under a zoning ordinance, that peti-

tioner cannot be denied his right by a subsequent change in the pertinent zoning ordinance. *See also Casey v. Zoning Hearing Board,* 459 Pa. 219, 328 A.2d 464 (1974).

It must be observed, of course, that a zoning permit for land use pertains to the tract of land itself. If land has been approved for a specific use, it matters not in whose name the permit is issued, Ryan, *Pennsylvania Zoning Law and Practice* §9.4.18 (1981), and under normal circumstances, any person having a proprietary interest in the subject land, could claim the permit or exercise the rights granted to the named permittee. If AES was the successor in interest to Moyer's, therefore, the mere fact that it was not the named applicant or permittee would not in and of itself bar its right to claim the permit.

The Township contends, of course, that when it issued the special exception permit to the receiver, it was complying with the order of this Court. Since the permit clearly spelled out that unless building commenced within six (6) months the permit would expire, all of Moyer's rights and those who succeeded in interest thereto terminated at the end of six (6) months from the date of issuance.[4] If this was the usual case where a special exception permit had been requested and granted, the Township clearly would prevail. As we have already indicated, however, this is far from the usual case.

We deem it necessary to first review what it was that this Court ordered in September of 1982. While it is true that we discussed both the constitutional challenge to the ordinance and the subsequent amendment permitting the use of the subject tract as a sanitary landfill by special exception, our order clearly was intended to provide that

a zoning permit be granted to the applicant. The discussion of the special exception aspect of the case was after we had already decided that the constitutional challenge should be sustained. At the time that challenge was made, the zoning ordinance excluded sanitary landfills. The Township's subsequent amendment was an effort to rehabilitate its ordinance after the proceedings challenging it had commenced and clearly could not remedy the fatal defect as to Moyer's. Our resolution of the special exception issue was secondary to our conclusion that the zoning ordinance was constitutionally infirm.

Having said that, we must recognize, at the same time, that we *did* hold that Moyer's was entitled to a special exception permit as well. It is necessary then, for us to consider at this time whether the issuance of such a permit by the Township to the receiver for Moyer's was full compliance with our order.

There can be no doubt that a receiver stands in the legal "shoes" of the debtor and, subject to court approval, may exercise all of the legal rights of the debtor. From the chronological recitation of events in the brief of Petitioners, we learn that the receiver was appointed for Moyer's on July 16, 1982. Although there was an installment sales agreement and two (2) option agreements executed February 27, 1981 by the terms of which AES now asserts that it has succeeded to the rights of Moyer's, there is nothing in the chronological statement of events or in the evidence presented at the hearing we held on the instant petitions, which would indicate when AES *exercised* its rights under the option agreements.[5] The installment sales agreement between AES and PB for the subject tract is dated February 28, 1983. We con-

clude, therefore, that on September 29, 1982, when the receiver requested that the special exception permit be issued, she, as receiver, and no one else, was the real party in interest entitled to that permit.

Petitioners point out that the receiver previously had represented to this Court in a petition for a stay order submitted before our decision of September 12, 1982, that Moyer's would not be in a position to proceed with the permit because of insolvency. That allegation is made, presumably, to indicate that the receiver may have acted in bad faith when she later requested the permit. We think that the most that could be said is that the receiver changed her mind.

We hold that the issuance of the special exception permit by the Township to the receiver was literal compliance with our order of September 14, 1982. The receiver could have asked for a "zoning permit" rather than a special exception permit[6] but she did not. Her failure in that respect cannot now be seized upon by Petitioners to compel the Township to issue yet another permit pursuant to our order.

The final question to be resolved is whether the return of the special exception permit by someone authorized by law to act for the named permittee constitutes a cancellation or abandonment of that permit. Here, Petitioners confront us with an agreement dated May 11, 1983 by the terms of which the receiver acknowledges that AES has taken by assignment the rights of Moyer's under Moyer's agreement with PB, and by the terms of which the receiver disclaims any interest in permits for the landfill in subject tract. In our judgment, the receiver was

giving up permit rights she no longer had and her recognition of AES as the real party in interest as of May 11, 1983 is after the fact.

We have no difficulty ascertaining that feelings of the litigants in this case are very strong. We realize that our decision today is a declaration that Moyer's won the battle but lost the war. On the other hand, we see no evidence that the Township did anything other than what our order permitted and directed it to do. Hints of complicity between the Township and the receiver are insufficient for us to impose sanctions in the within matter.

Inasmuch as we have disposed of this matter on the merits of the Petitioners' petition, we need not address the Township's motion to dismiss.

/s/ John A. MacPhail, Judge

FOOTNOTES

[1]Petition for allowance of an appeal to the Pennsylvania Supreme Court was denied January 14, 1983.

[2]Moyer's had an equitable interest in the 131 acre tract as a purchaser in an installment sale contract.

[3]Although PB and AES are joint petitioners and are referred to in this opinion as Petitioners, it is apparent from the evidence taken by this Court and the pleadings that PB has yielded whatever rights it may have had as a landowner to Moyer's and/or AES.

[4]When the receiver returned the permit to the Township, she said it was being returned "since I do not intend to make use of this permit".

[5]Both option agreements provided that the option should be exercised by AES giving written notice to the optionors (Moyer's and PB) of their intention to exercise the option.

[6]There is nothing to indicate one way or the other whether under the Township's ordinance a similar time restriction may have been applicable to zoning permits which were other than special exception permits.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

NO. 1741 C.D. 1981

MOYER'S LANDFILL, INC.,

Appellant

v.

ZONING HEARING BOARD OF LOWER
PROVIDENCE TOWNSHIP,

Appellee

O R D E R

The petition of Providence Builders, Inc. and Alternate Energy Store, Inc. for enforcement of court order and for substitution as parties in the within matter, is denied.

DATE: December 19, 1983

/s/ John A. MacPhail, Judge